Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 22, 2008

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QUESTION PRESENTED

Whether the Fourth Circuit used an improper standard to allow punitive damages for a failure to make reasonable accommodations in violation of the Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A), when it required only that the employer (a) had a "rudimentary knowledge" of the statute and (b) failed to provide reasonable accommodations, without any evidence of the employer's culpable intent or state of mind.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fourth Circuit.

The Petitioner here and appellant below is Federal Express Corporation (d/b/a FedEx Express).

The Respondent here is the Equal Employment Opportunity Commission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The parent company of Petitioner Federal Express Corporation (d/b/a/ FedEx Express) is FedEx Corporation, whose stock is publicly traded on the New York Stock Exchange under the symbol FDX.

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The opinion of the Court of Appeals for the Fourth Circuit is reported at 513 F.3d 360, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a–37a. The District Court's opinion is not reported, but is available at 2006 U.S. Dist. Lexis 23062, and is reprinted at Pet. App. 38a–43a.

JURISDICTION

The Court of Appeals for the Fourth Circuit issued its opinion on January 23, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. The pertinent provisions are reproduced at Pet. App. 44a-53a.

STATEMENT OF THE CASE

District court jurisdiction. The court of first instance, the United States District Court for the District of Maryland, had jurisdiction of this matter pursuant to 28 U.S.C. § 1331.

Factual Background. The Complaint filed by Respondent U.S. Equal Employment Opportunity Commission ("EEOC") alleged that Petitioner Federal Express Corporation ("FedEx") violated the Americans with Disabilities Act (ADA) with respect to a deaf FedEx employee, Ronald Lockhart. The Complaint

alleged that FedEx (a) failed to provide Lockhart reasonable accommodations for his disability during the course of his employment and (b) retaliated against Lockhart by terminating his employment.

FedEx denied these allegations, contending (a) that it had provided reasonable accommodations to Lockhart that enabled him to perform his job satisfactorily and to enjoy equally the benefits and privileges of his employment and (b) that Lockhart was terminated for a well-documented chronic absenteeism problem, and not for any reason related to his requests for accommodation.

The matter was tried to a jury in Baltimore, Maryland, beginning February 27, 2006. Over four days, live testimony was given by Lockhart, two of his managers at the local FedEx facility, two hourly co-workers of Lockhart, the interpreter retained by FedEx, and the EEOC's economic damages expert. In addition, videotape testimony was shown from a deposition of a FedEx-retained interpreter from one of its Ohio facilities.

The evidence at trial showed that Ronald Lockhart has been deaf since birth. FedEx hired Lockhart at its Baltimore-Washington International Airport facility ("BWI Ramp") in March 2000 as a package handler. As a package handler at the BWI Ramp, Lockhart took packages arriving from trucks or airplanes, separated and sorted them, and loaded them onto other trucks or airplanes.

Lockhart was the first deaf employee that his immediate supervisor, Vic Cofield, had supervised.

Cofield called someone at a separate location—he could not remember the title or the name of the department—and asked him what reasonable accommodations meant, and talked to him about some of the things he needed to do. Cofield's supervisor, Patrick Hanratty, was familiar with the Americans with Disabilities Act, and knew that reasonable accommodations would be required. FedEx has a corporate policy in its People Manual (a personnel policy and procedure manual) under which it takes affirmative action to employ and advance in employment qualified disabled individuals and to avoid discrimination based on any disability. Both Hanratty and Cofield conceded, however, that they did not specifically read the FedEx policy at the time Lockhart was hired.

Nevertheless, Cofield made changes to accommodate Lockhart, some of which were made before Lockhart could request them. Cofield noticed that the monthly videos shown to the employees were not closed-captioned, and he arranged for closed-captioned tapes from FedEx corporate headquarters. Cofield did this without being requested to do so by Lockhart. Cofield further noticed another hourly employee at the BWI Ramp communicating with Lockhart. He found out that this coworker had learned sign language as a child from his mother, and Cofield asked that coworker's manager if the coworker could help interpret with Lockhart on some occasions. The coworker interpreted a few times for them, until Lockhart said that he was not comfortable with the situation.

After Lockhart told Cofield that he was not comfortable with the coworker's signing, Cofield sought the services of a professional interpreter. Cofield talked to a senior manager at the FedEx facility at Dulles International Airport and got the name of an independent professional interpreter they were using there. The professional interpreter started providing professional interpretation services at the BWI Ramp in January 2002. From that time until the end of Lockhart's employment a year later in January 2003, the professional interpreter came to the BWI Ramp 19 times.

Lockhart and Cofield communicated using written notes during the entire time of Lockhart's employment. Lockhart's parents were not deaf and do not know sign language, and he communicated with them by writing on paper since he was small. Lockhart never indicated that he had a problem with the procedure of writing notes back and forth.

Lockhart was generally a good worker and received satisfactory performance reviews. He did not receive any warnings for safety violations or conduct. Like any other employee of FedEx, Lockhart had different benefit programs available to him, and he took advantage of them. As an airline, FedEx has interline agreements with other airlines to provide discounted airline tickets to its employees for their personal use. Lockhart understood the program and took advantage of it on more than one occasion, without the assistance of an interpreter. Lockhart also took advantage of the FedEx employee program related to tuition reimbursement, where an employee attends higher education classes and FedEx reimburses the employee

for tuition expenses. Lockhart was one of three employees at the BWI Ramp who took advantage of this program. Cofield—who was also utilizing the program—helped Lockhart with his paperwork, including calling the registration office at the University of Maryland to obtain the required papers, and Cofield himself submitted Lockhart's receipts to FedEx so that he could meet the requirements of the FedEx program.

The employees at the BWI Ramp were required to attend periodic meetings, some daily. At the daily meetings, lasting ten minutes at most, there was a quick headcount, then a period of physical stretching, and then announcements of any pertinent information for that day, such as late incoming trucks, problems from the past day, or upcoming holidays. At first, Cofield went to Lockhart and told him of any information that related to him. Later, Cofield provided written notes of the contents of the daily meetings. Lockhart never told Cofield that he did not understand something from a daily meeting. Monthly meetings also occurred, lasting approximately 30 minutes, with a short videotape from corporate headquarters—closed-captioned for at least some of Lockhart's employment—and other information similar to the daily meetings. Cofield also took Lockhart aside for these meetings to give him the information he needed or included it on a written document given to Lockhart.

At the close of the EEOC's case, FedEx moved for judgment as a matter of law on all claims, and in particular on the issue of punitive damages. FedEx argued that the evidence in plaintiff's case-in-chief was

insufficient to support a finding of malice or reckless indifference. The motion was denied, and then renewed and denied at the close of the defendant's case. FedEx objected to the punitive damages instruction for the same reasons, but the district court gave the instruction to the jury over defendant's objection.

The EEOC argued to the jury that the accommodations provided to Lockhart were inadequate, and that FedEx delayed in providing reasonable accommodations. It further argued that FedEx had terminated Lockhart not because of his absenteeism, but because Lockhart had filed an EEOC charge complaining of inadequate accommodations. The jury returned a verdict for the defendant on the issue of retaliation, finding FedEx did not discriminate against Lockhart when it terminated his employment. The jury found that FedEx had failed to provide reasonable accommodations to Lockhart, and awarded compensatory damages in the amount of $8,000. The jury further awarded $100,000 in punitive damages on that claim.

FedEx filed a Motion for Judgment as a Matter of Law as to Punitive Damages or, in the Alternative, for Remittitur. The basis for the motion was that the evidence at trial was insufficient as a matter of law to sustain an award of punitive damages because no evidence existed from which the jury could infer intentional acts of discrimination committed with malice or reckless indifference. FedEx alternatively requested that, if the motion for judgment as a matter of law were denied, the punitive damages be remitted to an amount that did not exceed a constitutionally

permissible level. The finding of liability for failure to provide reasonable accommodations and the award of compensatory damages were not the subject of any post-trial motions. Both motions were denied by an unpublished Memorandum Opinion. Pet. App. 38a-43a.

Petitioner appealed the issue of punitive damages to the Court of Appeals for the Fourth Circuit. On appeal, the Fourth Circuit affirmed the district court's refusal to set aside or remit the punitive damages. Pet. App. 1a. The court indicated that either malice or reckless indifference is necessary, and that "the evidence must only have been sufficient to prove reckless indifference," so it focused its analysis on that issue. Pet. App. 22a, n.9. The court addressed many of the facts recited above, and concluded that "a managerial official of FedEx perceived the risk that his failure to provide Lockhart with reasonable accommodations would contravene the ADA." Pet. App. 27a. It therefore affirmed the award of punitive damages.

REASONS FOR GRANTING THE PETITION

This case presents a narrow but important question relating to the standard under which punitive damages may be imposed on an employer for the failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA). The standard applied below by the Court of Appeals for the Fourth Circuit is in conflict with several other courts of appeals, *see* S. Ct. R. 10(a), and is inconsistent with the general principles set forth in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). *See* S. Ct. R.

10(c). This Court should grant certiorari review to resolve this marked discrepancy between the circuits and to provide clear guidance to those courts of appeals where the issue has not been addressed.

In *Kolstad* the Court explained the circumstances that would warrant punitive damages in Title VII discrimination cases generally. Relying on "congressional intent to authorize punitive awards to only a subset of cases involving intentional discrimination," the Court reaffirmed the two-tiered structure present in 42 U.S.C. § 1981a and the "higher standard that a plaintiff must satisfy to qualify for a punitive damages award." *Kolstad*, 527 U.S. at 534. The Court refocused the inquiry at the punitive damages stage away from the nature of the conduct and towards the employer's state of mind, including the "evil intent of the defendant" or the "bad motive of the wrong-doer." *Id.* at 538.

Relief for discrimination claims under the ADA mimics relief available under Title VII, and therefore courts understandably look to *Kolstad* for guidance in ADA cases. Yet courts have not interpreted *Kolstad* consistently with respect to the ADA, and in particular with respect to cases involving failures to make reasonable accommodations. Indeed, the various appellate courts that have encountered this issue have taken increasingly divergent approaches since 1999, and in those circuits where the issue has not been directly addressed, the district courts continue to take unpredictable paths.

The decision of the Fourth Circuit below conflicts with holdings of other courts of appeal, including an

opinion from the Eighth Circuit handed down in the very same month. Moreover, the Fourth Circuit's opinion is inconsistent with the principles of *Kolstad*, because it ignores the employer's state of mind. The Fourth Circuit excises from *Kolstad* the only sentence that restates the reckless indifference standard as "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages," *id.* at 536, and dismisses the remainder of the opinion. Under the Fourth Circuit's formulation—also followed by the Tenth Circuit—the employer's intent and motive become completely irrelevant to the inquiry, and the evidence need show only that (a) the employer was aware of its obligations under the ADA and (b) it failed to meet those obligations.

As set forth in greater detail below, this standard does not comport with the rationale or spirit of *Kolstad*. Applying this "perceived risk" standard will not limit punitive damages to a narrow subset of discrimination cases, but rather will allow the issue to go automatically to the jury in every ADA case involving the interactive process, regardless of the employer's state of mind in attempting to comply with its obligations. Subjecting employers to the "perceived risk" standard in this context discourages efforts to comply with the ADA, because facts about an employer's efforts to educate itself about reasonable accommodations required under the ADA or its participation in a meaningful interactive process are the very facts that allow punitive damages to be considered by a jury. That illogical result runs completely contrary to the principles underpinning *Kolstad* and the culpable state of mind required to

impose punitive damages. Allowing the opinion below to stand without providing clear guidance on this issue will only foster continued division among the circuits, and will further erode the main principles emphasized in *Kolstad*.

I. THE COURTS OF APPEALS HAVE DIFFERENT STANDARDS FOR ALLOWING PUNITIVE DAMAGES IN SITUATIONS INVOLVING A FAILURE TO MAKE REASONABLE ACCOMMODATIONS IN VIOLATION OF THE ADA.

In 1999 the Court considered *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), to determine the circumstances under which punitive damages could be awarded under Title VII. An *en banc* majority of a divided Circuit Court for the District of Columbia had held that some "egregious" conduct was required to qualify for punitive damages. The Supreme Court rejected the "egregious" nature element, but affirmed the concept of two separate standards for imposing punitive damages in discrimination cases: "one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award." *Kolstad*, 527 U.S. at 534. The rationale for this two-tiered structure was to give effect to Congress' intent to "narrow the class of cases for which punitive damages are available to a subset of those involving intentional discrimination." *Id.* at 535.

Explaining the second, higher standard, the Court focused not on the nature of the acts, but on the actor's state of mind. The statute that authorizes punitive

damages for Title VII claims—and likewise for ADA claims—provides that the employer must act with "malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The Court noted that § 1981a was enacted after its 1983 decision of *Smith v. Wade*, and that Congress may have borrowed its language from that opinion. According to *Smith*, "a jury may be permitted to assess punitive damages ... when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *see Kolstad*, 527 U.S. at 536. After reviewing the various phrases used to describe the requisite state of mind, including "'subjective consciousness' of a risk of injury or illegality," "criminal indifference to civil obligations," "wantonness," and "conscious indifference to consequences," the Court announced the standard in the context of § 1981a: "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 536.

This "perceived risk" standard applies satisfactorily to most cases brought under Title VII or the ADA in which the plaintiff alleges intentional discrimination. When an employee is harassed, fired, demoted, or treated differently from other employees in the workplace, it is a straightforward analysis to ask whether the employer took the illegal discriminatory acts in the face of a perceived risk that it would violate federal law. Application of the "perceived risk" standard is not straightforward, however, in the context of allegations that the employer failed to make

reasonable accommodations to a qualified employee. To determine what reasonable accommodations may be, the Code of Federal Regulations states that it may be necessary for an employer "to initiate an informal, interactive process" with the employee to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). This interactive, back-and-forth process of identifying limitations and "potential" accommodations necessarily implies some trial and error both for the employer and the employee to discover the reasonable accommodation that allow, on one hand, the employee to perform his job functions and enjoy the rights of privileges of other employees, and on the other hand, do not constitute an undue hardship on the employer's finances and operations. *See* 29 C.F.R. § 1630.2(o and p). Because the employer is permitted to weigh "significant difficulty or expense," 29 C.F.R. § 1630.2(p)(1), the employer can legally deny an employee's request or offer accommodations that vary from those requested by the employee, as long as they ultimately satisfy the employee's needs.

In making this decision within the bounds of the interactive process, the employer would by definition be acting with a knowledge of its obligations under federal law and actually attempting to meet those obligations. If a jury were to later conclude that the accommodations offered by the employer were insufficient, the employer would nevertheless have violated the ADA by failing to make reasonable accommodations. *See* 42 U.S.C. § 12112(b)(5)(A). Under the "perceived risk" standard, punitive damages would automatically go to the jury in every ADA case

involving the interactive process, regardless of the employer's state of mind in attempting to comply with its obligations. Employers face the impossible choice between keeping their managers ignorant of the ADA—exposing themselves to greater potential liability while failing to serve their employees—and educating their managers about the ADA's obligations—consequently providing the court with the necessary evidence to allow a jury to consider punitive damages. *Kolstad's* "perceived risk" language could not have been intended to have this effect.

A. The Second, Seventh, and Eighth Circuits require evidence of "evil motive" or "reckless state of mind," consistent with the main tenets of *Kolstad.*

Most of the courts of appeals that have faced this issue after *Kolstad* do not rigidly apply the "perceived risk" standard, but instead interpret that language within the larger context of *Kolstad's* discussion of the employer's state of mind. Soon after *Kolstad* was decided, the Seventh Circuit heard a case in which an employee with depression and anxiety disorders requested a transfer to a different shift and the employer denied that request and offered no other reasonable accommodation. *Gile v. United Airlines, Inc.*, 213 F.3d 365 (7th Cir. 2000). The Seventh Circuit found that the evidence was sufficient for the jury to find that the employer had failed its ADA obligation, *see id.* at 373 (the employer "flunked its obligations under the ADA"), but found further that the employer "did not act with reckless disregard for [the employee's] ADA rights." *Id.* at 375. The court explained:

It is clear that McGuffin [employer's regional medical director] and Gile's floor supervisors knew of the ADA and United's reasonable accommodation policy, but United did not act with reckless disregard for Gile's ADA rights. Gile's supervisors deferred to McGuffin's evaluation, and McGuffin believed that a shift transfer would not have accommodated Gile's disability. McGuffin in good faith disagreed with Orlandino [employee's psychotherapist] that a shift transfer would enable Gile to work and believed that Gile's psychological condition was a nonoccupational, personal problem which did not trigger any obligation under the ADA on United's part. Punitive damages depend not on the egregiousness of the defendant's misconduct, or its callousness in denying reasonable accommodation, but instead run from a culpable state of mind regarding whether that denial of accommodation violates federal law. *See Kolstad*, 119 S. Ct. at 2124; *see also Deters v. Equifax Credit Info. Servs.*, 202 F.3d 1262, 1269 (10th Cir. 2000). United's failure to accommodate Gile's disability amounted to negligence because it misunderstood Gile's difficulties, did not regard her condition a disability and neglected to pursue Gile in developing an alternative accommodation. Although United wrongly believed that Gile was not disabled under the ADA and did not adequately address her accommodation request, United did not exhibit the requisite reckless state of mind regarding whether its treatment of Gile violated the ADA.

Id. at 375-76. The Seventh Circuit refused to permit punitive damages to go to the jury based on nothing more than a combination of a failure to accommodate under the ADA and the employer's awareness of its ADA obligations.

The Second Circuit reached a similar conclusion applying similar rationale. In *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224 (2d Cir. 2000), the Second Circuit found sufficient evidence for a violation of the ADA, but reversed the jury's award of punitive damages. Discussing the "perceived risk" standard set forth by *Kolstad*, the court nevertheless reviewed the record for evidence of the "requisite 'evil motive,'" *id.* at 236, but found none to warrant punitive damages. To the contrary, the court noted that the employer had contacted counsel before denying the employee's request for more time off, an act clearly inconsistent with "reckless disregard" for the employee's rights. *Id.* at 236.

Earlier this year and a week before the Fourth Circuit issued the decision below, the Eighth Circuit decided a case consistent with the Seventh and Second Circuit's decisions in *Gile* and *Wiessman*, and directly contrary to the Fourth Circuit's holding. In *Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024 (8th Cir. 2008), the Eighth Circuit reviewed a Title VII case that related to a request by an employee for a religious accommodation. The court upheld the compensatory award for UPS's failure to accommodate its employee's sincerely held and properly communicated religious beliefs, but reversed the jury's award of punitive damages. Specifically, the court found that:

> No UPS employee was shown to have acted with malice or reckless indifference to Sturgill's accommodation request. The district and regional managers concluded, after consulting a union representative, that Sturgill's suggested accommodations would violate the CBA or disrupt UPS operations. Accordingly, they denied his request and suggested he use his seniority to bid on a combination job when available. ... The jury reasonably found that the lack of communication between the local managers and the Title VII decision-makers resulted in a failure to reasonably accommodate Sturgill's religion on December 17, but this is nothing more than violation of a Title VII negligence standard.

Id. at 1035. Like the Seventh and Second Circuits, the Eighth Circuit rejects the notion that a mere awareness of obligations under federal law coupled with a jury's finding of a violation automatically results in the availability of punitive damages.

The collective conclusion of these courts of appeals is consistent with the main principles of *Kolstad*: the employer's state of mind is determinative of potential punitive damages. It is also consistent with the idea of a second, more exacting standard for the imposition of punitive damages that Congress intended and that *Kolstad* explicitly endorsed. It is not consistent, however, with the decisions coming from other courts of appeals, including those in the Fourth and Tenth Circuits.

B. The Fourth and Tenth Circuits require only that the employer be familiar with the accommodation requirements of the ADA coupled with a finding of an ADA violation, and do not require evidence regarding the employer's intent.

In this case, the Fourth Circuit reviewed the issue of punitive damages on the standard that "[a] showing of reckless indifference required proof that a FedEx managerial official failed to accommodate Lockhart in the face of a perceived risk that such a failure would violate the ADA. *See Kolstad*, 527 U.S. at 536." *EEOC v. Federal Express Corporation*, 513 F.3d 360, 372 (4th. Cir. 2008) (Pet. App. 23a-24a). According to the Fourth Circuit's past holdings, a finding of a "perceived risk" only requires that an employer have "'at least a rudimentary knowledge' of the import of a federal anti-discrimination statute." *Id.* at 372-73 (Pet. App. 24a) (quoting *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002)). In the instant case, this knowledge was not disputed. As the court noted, Lockhart's manager had, in addition to the various accommodations he made for Lockhart, "contacted other FedEx officials, including Connors in FedEx's 'corporate headquarters,' an unnamed official in FedEx's legal department, and Arrington (Senior Personnel Representative for the FedEx-BWI Ramp) seeking clarification on what might constitute reasonable ADA accommodations for Lockhart." *Id.* at 374 (Pet. App. 26a-27a). FedEx had knowledge of its obligations under the ADA. The jury found, however, that the actions of FedEx and its managers were insufficient to constitute reasonable accommodations and awarded $8,000 in compensatory damages.

These two facts—the knowledge of FedEx of its ADA obligations and the jury's finding of liability—were the only factors that the Fourth Circuit required to warrant punitive damages. Specifically, the court held that "a managerial official of FedEx perceived the risk that his failure to provide Lockhart with reasonable accommodations would contravene the ADA [and therefore] the jury was entitled to find that FedEx had acted, in *Kolstad*'s terms, with 'recklessness in the subjective form.'" *Id.* at 374 (Pet. App. 27a).

The Fourth Circuit's decision is not a complete anomaly in the federal court system. The Tenth Circuit has issued opinions with a similarly low punitive damage threshold. In *EEOC v. Heartway Corp.*, 466 F.3d 1156 (10th Cir. 2006), the Tenth Circuit clearly announced its own two-part test for allowing punitive damages to go to the jury: "where (1) there is sufficient evidence for the jury to decide whether an employee intentionally and illegally discriminated on the basis of a disability and (2) there is evidence that the employer knew the requirements of the ADA." *Id.* at 1168. In that case, the testimony of a manager that he "knew his obligations under the ADA" was adequate to send the issue of punitive damages to the jury with the underlying claim.

The diminished standard that the Fourth and Tenth Circuits have developed from *Kolstad's* "perceived risk" standard is not consistent with the larger holding of *Kolstad*. At oral argument in *Kolstad*, the Court questioned whether the parties were proposing that every case of intentional discrimination go to the jury on the question of

punitive damages. *See, e.g.*, Oral Arg. Tr. 2 (Justice O'Connor), 28-29 (Justice Breyer), 47 (Justice Kennedy). Counsel for the parties appeared to deny that every case would warrant allowing the jury to impose punitive damages. *See id.* The resulting opinion in *Kolstad*, with its approval of a second, higher standard, and its acknowledgement of Congress's intent to narrow punitive damages to a subset of intentional discrimination cases, also appeared to reject that theory. *Kolstad*, 527 U.S. at 534. The evolved standards of the Fourth and Tenth Circuits, however, effectively allow every case that survives summary judgment to go the jury with the issue of punitive damages still open. The potential exception would be the extremely unlikely case when an employer admits that it is unfamiliar with its ADA obligations—circumstances which seem to favor the imposition of punitive damages more than the cases where an informed employer uses negligent judgment. Paradoxically, an informed employer that makes substantial overt efforts to comply with its ADA obligations through the interactive process is punished when it negligently fails to comply, more so than an employer that remains ignorant of its obligations and makes no efforts to accommodate a disabled employee.

The basis for the Fourth and Tenth Circuits' rationale is the one sentence in *Kolstad* that uses the "perceived risk" language. Although the Court seems, in this sentence, to state explicitly a "standard," this is the only place in the opinion where that phrase is used. Even when discussing issues left on remand, the Court reverted back to the "malice or reckless indifference" wording without reference to the broader "standard" that an employer act "in the face of a

perceived risk" of violating federal law. *See Kolstad*, 527 U.S. at 546. Moreover, the author of the *Kolstad* majority opinion is the same Justice who wrote of punitive damages in an earlier opinion that "[w]hen awarded, they were reserved for the most reprehensible, outrageous, or insulting acts," *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting), casting substantial doubt on an interpretation of *Kolstad* that makes punitive damages available to a far greater class of cases and for conduct that could amount to no more than simple negligence.

The standards of the Fourth and Tenth Circuits are in conflict with those of at least three other Circuits, and are inconsistent with the Supreme Court precedent whence they were derived. In this case, the infirm standard lowered the burden for punitive damages to the same standard as simple statutory liability, and the employer was impermissibly harmed.

C. Other courts, including those in the First, Third, and Fifth Circuits, have an unclear standard.

In addition to the clear circuit conflict outlined above, other courts of appeal have been unsuccessful in arriving at a succinct standard when faced with cases relating to failure to make reasonable accommodations. The Fifth Circuit in *EEOC v. E.I. DuPont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007), restated the standard from *Kolstad* that the employer "'must at least discriminate in the face of a perceived risk that its actions will violate' the ADA." *Id.* at 732. The court then found that "DuPont was

aware of its responsibilities under the ADA." *Id.* at 733. While this finding would have been sufficient to send punitive damages to the jury under the Fourth and Tenth Circuit's formulation, the Fifth Circuit proceeded to enumerate misdeeds by the employer against the employee, including statements made about the employee's "crippled crooked self," and upheld punitive damages. *Id.* If evidence of misdeeds is required to support punitive damages, then the Fifth Circuit's rationale is at least closer to the holding of *Kolstad*, but the opinion is unclear on this issue.

Like the Fifth Circuit, the Third Circuit has also applied *Kolstad* to a failure to accommodate case with a literal restatement of the standard and additional facts. In *Gagliardo v. Connaught Labs.*, 311 F.3d 565 (3d Cir. 2002), after citing the "perceived risk" language, the court listed the evidence sufficient to support the jury's finding of reckless indifference. The facts included the extent of the employer's knowledge of the employee's disability, evidence that the employer had internal discussions about the employee's condition before her dismissal, and multiple requests by the employee for accommodations that the employer "refused to act on." *Id.* at 573. "In sum," the court concluded, "there was sufficient evidence to support the jury's award of punitive damages." *Id.* The recitation of the basic standard with a subsequent review of facts relating to the employer's state of mind calls into question whether the Third Circuit's approach is more like that of *Kolstad* and the Second, Seventh, and Eighth Circuits, or more like that of the Fourth and Tenth Circuits.

In the remaining circuits, the district courts have little to no guidance. For example, a district court in the First Circuit analyzed the issue:

> The Supreme Court went on to explain their decision in [*Smith v. Wade*, 461 U.S. 30], saying that while it is unnecessary to show actual malice in order to qualify for a punitive award, "recklessness in its subjective form" must be demonstrated. [*Kolstad*, 527 U.S. at 536]. Ultimately an employer "must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* There was ample evidence presented at trial to meet this standard. Defendants argue that they made a good faith effort to accommodate Plaintiff and that the steps they took preclude a finding of malice. This argument too falls short, as caselaw clearly indicates a showing of malice is not required.

Toro Cotto v. Liga Puertorriquena Contra El Cancer, No. 04-1285 (HL), 2007 U.S. Dist. LEXIS 10434, at *24 (D.P.R. Feb. 14, 2007). The district court appears to follow the strict reading of the Fourth and Tenth Circuits that once an employer is aware of the law and is found to have violated the statute, then punitive damages are automatically available. But another district court in the First Circuit required more than mere knowledge. In *Sprague v. United Airlines, Inc.*, No. 97-12102-GAO, 2002 U.S. Dist. LEXIS 14519, at *65 (Aug. 7, 2002), the district court included in its findings:

> 93. The Court further holds that Sprague is entitled to punitive damages because the actions of United in withdrawing the line mechanic job offer were done with the "knowledge that it may be acting in violation of federal law." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1244-46 (10th Cir. 1999).
>
> 94. The absence of a bona fide belief that the refusal to hire Sprague was lawful is amply demonstrated by the shifting and serial justifications advanced by United. The refusal to engage Sprague in a genuine interactive process or to entertain with any degree of seriousness the possibility of reasonable accommodations to his disability warrant the imposition of punitive damages, which are awarded in the sum of $200,000.

The district court cited the Tenth Circuit's lower standard of mere knowledge, but it also cited to facts in the record that relate to the employer's culpable state of mind as shown through the "shifting and serial justifications." If it were following the Tenth Circuit's standard completely, evidence of a culpable state of mind is unnecessary.

These two cases from the First Circuit are particularly noteworthy because of the First Circuit's own prior rulings on this issue. A case from the First Circuit discusses punitive damages under the ADA, although it is not precisely applicable because the employer was found liable for the employee's

discriminatory firing in addition to a failure to accommodate her disability. Even in that case, however, the First Circuit could not find "any facts that would support an award of punitive damages under the principles announced in *Kolstad*," and it affirmed the district court's decision not to submit the issue to the jury at trial. *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 254 (1st Cir. 2000). Despite this holding, district courts within the First Circuit have no clear precedent to follow on the narrow but important issue of punitive damages in a failure to accommodate case. In addition to resolving the split in the circuits, all courts are in need of clarification of this issue.

II. COURTS HAVE HAD AN OPPORTUNITY TO SETTLE THIS ISSUE SINCE *KOLSTAD* IN 1999, BUT CONTINUE TO HAVE DIVERGENT AND INCONSISTENT APPROACHES.

Several courts of appeals applied *Kolstad* to failure to accommodate cases in the first few years after the opinion was issued. *See Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 254 (1st Cir. 2000); *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224 (2d Cir. 2000); *Gile v. United Airlines, Inc.*, 213 F.3d 365 (7th Cir. 2000); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1244-46 (10th Cir. 1999). As discussed above, the conclusions of these courts varied, and in some cases contradicted each other. As time passed, the issue did not resolve itself, but continued to be unsettled. The Third Circuit's opinion in 2002 did not follow one path or the other, and in fact did not cite any other federal court of appeal. *See Gagliardo v. Connaught Labs.*, 311 F.3d 565, 572 (3d Cir. 2002).

Later in 2007, the Fifth Circuit's equally ambiguous opinion did not cite any other authority but *Kolstad* for support of its punitive damages standard. *See EEOC v. E.I. DuPont de Nemours & Co.*, 480 F.3d 724, 732-33 (5th Cir. 2007). Finally, in 2008, two separate courts of appeals decided cases with opposite holdings within a week of each other, both citing *Kolstad* for support. *Compare Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024, 1035 (8th Cir. 2008) *with EEOC v. Federal Express Corporation*, 513 F.3d 360, 372 (4th Cir. 2008).

This issue has had ample opportunity to percolate through the courts and resolve itself. In the decade since *Kolstad*, a uniform standard has not evolved for punitive damages in failure to accommodate cases. To the contrary, two factions have consistently followed divergent paths, and other courts of appeals do not appear to be choosing one path or the other, leaving their district courts without guidance on the issue. The issue is now ripe for this Court to resolve the circuit split and provide the needed guidance.

III. FEDERAL LAWSUITS RELATING TO THE ADA ARE INCREASING EVERY YEAR AND THE IMPOSITION OF PUNITIVE DAMAGES IN THOSE CASES IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT SHOULD CLARIFY.

Although the question presented for the Court may be a narrow one, it is nevertheless an important one for employers and employees alike. The number of ADA cases filed in the federal courts has been increasing in past years. In 2004, a separate Nature of Suit code (445) was created for ADA-Employment

cases. According to PACER queries on this code, there were 828 cases filed in 2005; 961 cases filed in 2006; and 1037 cases filed in 2007. The EEOC does not report any increases in the past several years in administrative charges, but its own figures show approximately 15,000 ADA charges received each year for the past ten years.[1] *See* U.S. Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges FY1997-FY2007, http://www.eeoc.gov/stats/ada-charges.html (last visited April 18, 2008). The sheer number of cases each year potentially involving the issue raised in this Petition militates in favor of review by the Court.

In addition to the number of employees and employers affected, the issue itself has significance from various policy perspectives. As discussed above, employers could be discouraged from substantial participation in the interactive process out of fear that greater knowledge of ADA obligations increases the likelihood of punitive damages. Corporations with nationwide presence, such as Petitioner, will find it difficult to formulate policies and parameters for ADA accommodation requests when the same treatment could face different potential liability in different circuits.

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[1] Furthermore, one independent study has estimated that only 14% of eligible ADA administrative charges became filed lawsuits, making the potential number of ADA lawsuits even higher than the actual number filed. *See* Moss, K., et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, Mental & Phys. Disability L. Rptr., Vol. 29, p. 303 (May/June 2005).

Finally, punitive damages are more and more a particularly sensitive issue for employers. As the author of *Kolstad* recognized in a different opinion, "there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (O'Connor, J., dissenting). In today's atmosphere of easy and broad access to court decisions through the internet and other means, corporations are more vulnerable to reputational harm from unwarranted punitive damages than ever. The amount of the punitive damages is not necessarily the crucial fact; it is that they were awarded at all. This Court should insure that punitive damages are considered by a jury only when the law allows—when evidence of malice or reckless indifference exists—and should not allow a diluted standard to develop within the courts.

CONCLUSION

The conflicting decisions of the courts of appeal and the inconsistency of some of those courts' opinions with the holdings of this Court necessitate review of the Fourth Circuit's opinion below. The issue is also an important one for policy reasons, and the Petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-1724

[Filed January 23, 2008]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

FEDERAL EXPRESS CORPORATION, d/b/a FedEx Express,
Defendant-Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
William D. Quarles, Jr., District Judge.
(1:04-cv-03129-WDQ)

Argued: September 25, 2007

Decided: January 23, 2008

Before KING and GREGORY, Circuit Judges, and Samuel G. WILSON, United States District Judge

for the Western District of Virginia,
sitting by designation.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Gregory and Judge Wilson joined.

COUNSEL

ARGUED: Edward John Efkeman, FEDERAL EXPRESS CORPORATION, Memphis, Tennessee, for Appellant. Davis L. Kim, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellee. **ON BRIEF:** Ronald S. Cooper, General Counsel, Lorraine C. Davis, Acting Associate General Counsel, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellee.

OPINION

KING, Circuit Judge:

Federal Express Corporation ("FedEx") appeals from a March 2006 judgment for compensatory and punitive damages entered against it in the District of Maryland. The Equal Employment Opportunity Commission (the "EEOC") sued FedEx on behalf of former FedEx package handler Ronald Lockhart. By its judgment, the district court awarded Lockhart, who is disabled due to deafness, the sums of $8,000 in compensatory damages and $100,000 in punitive damages, premised on a jury finding against FedEx for failing to reasonably accommodate Lockhart under the Americans with Disabilities Act (the "ADA"). *See* 42

U.S.C. § 12112(b)(5)(A). On appeal, FedEx maintains that the district court erred in failing to grant judgment as a matter of law or, alternatively, a remittitur, on two bases: (1) that there was insufficient evidence on which to submit the question of punitive damages to the jury; and (2) that the punitive damages award was constitutionally excessive. As explained below, we reject these contentions and affirm.

I.

A.

Ronald Lockhart, a resident of College Park, Maryland, has been profoundly deaf since his birth in 1959. He is unable to either speak or read lips, but is fluent in American Sign Language ("ASL"), which is his primary language. He studied English formally, but has never mastered the language. Lockhart uses ASL to communicate with his wife, who is also deaf, and with his children.

Between March 2000 and January 2003, while a full-time under-graduate student at the University of Maryland, Lockhart was employed by FedEx as a package handler at FedEx's Baltimore-Washington International Airport facility (the "FedEx-BWI Ramp"). He worked approximately twenty-five hours per week between 2:00 a.m. and 7:00 a.m. on various night shifts. While working for FedEx, Lockhart made repeated requests for an ASL interpreter and other

accommodations, so that he could understand what occurred at employee meetings and training sessions.[1]

On October 17, 2001, Lockhart filed a formal charge of discrimination with the EEOC against FedEx, alleging that it had violated the ADA by denying him reasonable accommodations for his deafness disability. In July 2002, the EEOC determined that FedEx had discriminated against Lockhart by repeatedly denying him ASL translation "for full participation in meetings, training, and safety and security events." J.A. 715.[2] The EEOC advised that it would initiate conciliation proceedings with FedEx to resolve the issues presented by Lockhart's discrimination charge. Any such proceedings were apparently unsuccessful, and, on January 17, 2003, FedEx discharged Lockhart from his employment at the FedEx-BWI Ramp, citing deficient attendance as the reason for its decision. Lockhart thereafter filed an additional charge with the EEOC, alleging that his discharge by FedEx had been retaliatory.

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[1] Prior to his employment with FedEx, Lockhart worked for approximately sixteen years as a janitor at a Veterans Administration Hospital in California and at Gallaudet University in Washington, D.C. Both employers provided ASL interpreters for Lockhart at meetings and workshops related to his employment.

[2] Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties in this appeal.

B.

On September 30, 2004, the EEOC filed its complaint against FedEx in the District of Maryland. The complaint alleged that FedEx had violated the ADA by failing to provide reasonable accommodations to Lockhart, and that FedEx had unlawfully terminated Lockhart in retaliation for the discrimination charge he filed with the EEOC. As relevant here, the complaint sought both compensatory and punitive damages, alleging that FedEx had acted with malice and reckless indifference to Lockhart's federally protected rights, and that it had failed to act in good faith. The case was thereafter tried before a jury in Baltimore, over the four day period from February 27 to March 2, 2006.

1.

At trial, the EEOC established that Lockhart's supervisors were always aware of his disability. They were also familiar with the ADA and FedEx's obligations thereunder, but nevertheless failed to provide ASL translation assistance or other accommodations to Lockhart at employee meetings and training sessions.[3]

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[3] At trial, the EEOC called six witnesses, including Lockhart, to testify on its behalf. FedEx also called several witnesses in support of its defense. In assessing the issues raised in this appeal, we are obliged to view the evidence in the light most favorable to the EEOC, as the prevailing party at trial, drawing all reasonable inferences in its favor. *See ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co.*, 472 F.3d 99, 113 (4th Cir. 2006).

a.

When Lockhart first interviewed for the FedEx package handler position with FedEx-BWI Ramp Operations Manager Ronald Thompson in the spring of 2000, Thompson declined Lockhart's request that FedEx provide him an ASL interpreter for the interview. As a result, it was necessary for Lockhart to bring a friend to translate during the interview, and for the friend to also assist at a multi-day orientation training session that followed Lockhart's hiring. Lockhart explained that he supplied his own interpreter for these initial events because he "really wanted the job," and because he "felt as if [he] had no other choice." J.A. 148. Immediately after hiring Lockhart, Thompson informed his own supervisor, Pat Hanratty, about Lockhart's disability. As the Senior Operations Manager for FedEx at the BWI Ramp, Hanratty bore ultimate responsibility for all FedEx personnel matters there. Upon learning that Thompson had hired a deaf employee, Hanratty immediately "ask[ed Thompson] why" he had done so. *Id.* at 489.

b.

As a package handler at the FedEx-BWI Ramp, Lockhart's duties included sorting, scanning, and stacking packages and letters, as well as attending employee meetings and training sessions. Such events included daily briefings conducted prior to each work shift, monthly meetings (often supplemented with video presentations) of up to two hours, plus quarterly meetings and occasional training sessions. These mandatory meetings and training sessions were used

by FedEx to address essential topics for its employees, such as workplace safety, job training, and employee benefits. Although Lockhart did not need or request any accommodations with respect to the routine handling of packages, he was "unable to understand what [was] going on in the meetings" and training sessions without an ASL interpreter or other accommodations. J.A. 670.

From the time Lockhart began working for FedEx in March 2000 until his discharge in January 2003, he made repeated requests to his supervisors for the accommodations necessary to enable him to reasonably comprehend and participate in employee meetings and training sessions. On multiple occasions, Lockhart asked his supervisors for complete notes from the daily briefings, and for ASL translation and closed-captioning assistance at monthly meetings. In July 2000, Victor Cofield, a FedEx-BWI Ramp Operations Manager, replaced Thompson as Lockhart's direct supervisor. Cofield served as such for most of the nearly three-year period of Lockhart's FedEx employment, and thus was the point of contact for many of Lockhart's requests for accommodations.

The EEOC's evidence at trial demonstrated that Cofield routinely ignored Lockhart's requests for accommodations. Lockhart received only sporadic notes from his supervisors or co-workers, which briefly summarized some of the meetings and training sessions. Lockhart "almost never" received notes from the daily meetings, and he was "very frustrated" that, although his co-workers were being given essential information concerning their jobs, he had "no way of knowing" what topics were being discussed. J.A. 154.

During the first two years of his FedEx employment, Lockhart received no ASL interpretation or closed-captioning accommodations for any employee meetings. On multiple occasions, Lockhart was not advised when such meetings were to occur. During the various training sessions, Lockhart was sometimes provided with closed-captioned videos, but he was never provided with ASL translations of live presentations. According to Lockhart, he thus felt "frustrated" and "very behind." *Id.* at 157. He told the jury that several of his co-workers "kept giving me pity or saying they felt sorry for me and sad for me because I didn't know what was going on and that I was missing so much." *Id.* Often, it was Lockhart's co-workers who provided him with meeting notes, apparently on their own volition.

Cofield knew that English was Lockhart's second language, and Lockhart admitted that his use of written English was, in his own words, "not very good." J.A. 224. Nevertheless, for most of the three-year period that he worked for FedEx, Cofield resorted to writing notes in English as his sole means of communicating with Lockhart. In that regard, Cofield even relied on Lockhart to supply the materials necessary for writing such notes. On days when Lockhart did not bring a notepad, Cofield recalled, "we would find a piece of paper somewhere, . . . out of a trash can, off the floor or something, and write [notes]." *Id.* at 314. On at least three occasions, Cofield asked another FedEx employee – who was somewhat familiar with ASL but not certified as an ASL interpreter – to translate for Lockhart. Lockhart had difficulty comprehending this employee's ASL translations because, although the employee could use

the ASL alphabet to spell English words, he was not fluent in the ASL language.

FedEx personnel records indicate that Lockhart completed twenty-four separate company-administered training courses – including courses on how to avoid workplace violence, how to recognize and interpret hazard labels on packages, and how to safely handle dangerous materials. According to these records, Lockhart performed satisfactorily in all of the graded training sessions. On those occasions when FedEx required its employees to take computerized tests at the conclusion of a training session, however, FedEx would direct a "team leader" to sit with Lockhart at his computer and answer test questions for him if he made incorrect answers. As Lockhart recalled, "the team leader would . . . move[] me out of the way and start[] taking the test for me." J.A. 165-66. One such team leader, Marvin Redd, acknowledged that, after helping Lockhart take such tests "four or five times," Redd advised Cofield that Redd "couldn't do it anymore," because he "kind of felt like [he] was belittling [Lockhart] as a person." *Id.* at 445. Thereafter, Cofield himself corrected Lockhart's incorrect answers. Lockhart was "very embarass[ed]" by the test-taking arrangements, because his co-workers necessarily assumed that he was "just stupid." *Id.* at 166.

Lockhart's need for accommodations became particularly acute after the events of September 11, 2001, when the FedEx managers at BWI convened several meetings on security issues, covering subjects such as potential anthrax exposure. Because he was denied ASL translation assistance and meeting notes, Lockhart was unable to effectively participate in these

security meetings. As a result, Lockhart felt "very paranoid" and "emotional," and he was "concerned about [his] own safety," due to the vast amount of information that he was not receiving. J.A. 167. "[M]y co-workers started to feel very concerned for me," Lockhart testified, "because there was so much information that I wasn't getting, and they were concerned for my safety." *Id.*

In late 2001, revised federal aviation regulations were promulgated requiring all FedEx-BWI Ramp employees to obtain and wear security badges while at work. Lockhart was unable to obtain his security badge, however, because he lacked the assistance of an ASL interpreter; he thus had to work without a security badge for several months, in violation of the regulations. During that period, Lockhart feared that he would be fired or laid off for not having his required security badge.

c.

Almost two years after Lockhart was first hired at the FedEx-BWI Ramp, Cofield gradually began to provide accommodations for his deafness. In January 2002, Cofield made a certified ASL interpreter, Derwood O'Quinn, available to assist Lockhart in obtaining his security badge. O'Quinn had served as an ASL interpreter for FedEx at its facilities at BWI and nearby Dulles International Airport since 2001. Although Cofield was aware of Lockhart's ongoing need for an ASL interpreter, he made O'Quinn available to Lockhart on a limited basis only. For example, Cofield provided Lockhart with O'Quinn's services at only some of the monthly meetings

conducted between January 2002 and the termination of Lockhart's employment in January 2003. On occasion, O'Quinn would merely translate the video portions of the meetings, doing so the day after the actual meeting had occurred. Lockhart never received ASL translation assistance for any daily briefings, training sessions, or quarterly meetings with FedEx's senior management.

Sometime in the fall of 2002, Cofield began ordering closed-captioned versions of training videos used in the FedEx monthly meetings. Cofield did not, however, provide Lockhart with notes from the daily briefings on a consistent basis until December 2002. Cofield began providing Lockhart with notes from the monthly meetings around the same time, although Cofield admitted that such notes were only the bulleted outlines of such meetings, as prepared for all package handlers. Even then, the notes were made available for some, but not all, of the monthly meetings. Significantly, it was not until January 2003 – nearly three years after he began working at the FedEx-BWI Ramp, and just a few weeks after Cofield first learned that Lockhart had filed his discrimination charge with the EEOC – that Lockhart was provided with FedEx's approved form for requesting disability accommodations. Lockhart was discharged that same month.

d.

Since 1991, FedEx has maintained an internal ADA compliance policy, guaranteeing reasonable accommodations to its disabled employees. The details of this compliance policy – including the reasonable

accommodations requirement – are spelled out in a FedEx human resources policy manual called the "People Manual."[4] Hanratty, as the Senior Operations Manager at the FedEx-BWI Ramp, acknowledged at trial that he was aware of FedEx's ADA compliance policy, and that he had received ADA training from FedEx. Hanratty admitted being familiar with the ADA's requirement that employers make reasonable accommodations for their disabled employees. Strikingly, however, during Lockhart's employment with FedEx, Hanratty never utilized the People Manual to ascertain how to accommodate Lockhart's deafness disability.

Moreover, although Hanratty was responsible for all personnel matters at the FedEx-BWI Ramp, he failed to ensure that FedEx's ADA compliance policy was implemented there. Hanratty's subordinate, Cofield, who directly supervised Lockhart, had never received any ADA training from FedEx. And, prior to Lockhart being hired, Cofield had never supervised a deaf employee at FedEx. Cofield acknowledged that he asked Hanratty for ADA training, but that he had

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[4] FedEx's ADA compliance policy, as set forth in the People Manual, specifies, inter alia, that FedEx "provides reasonable accommodation in the employment of the handicapped upon request where such accommodation does not cause undue hardship." J.A. 832. The compliance policy includes a definition for, and provides examples of, reasonable accommodations, and it lays out guidelines for what may constitute undue hardship to FedEx. It also references a complaint procedure by which written complaints of violations of the compliance policy may be filed. As written, the grievance procedure appears to be available only to "[d]isabled applicants." *Id.*

received none. Indeed, in Cofield's words, "[t]here was no ADA training at Federal Express." J.A. 370.

After reaching a dead end with Hanratty, Cofield made several futile efforts to obtain clarification from other senior FedEx officials about FedEx's ADA-mandated obligation to accommodate Lockhart's disability. At one point, Cofield sought advice on such obligations from an official in FedEx's legal department, described by Cofield as "a guy down at the Beltsville location." J.A. 329. Cofield admitted discussing the ADA requirements of "reasonable accommodations" with this legal department official, including the importance of "making sure we kept the lines of communication open, that . . . safety was number one, and . . . providing [Lockhart] with any . . . written documentation that we could." *Id.* On two occasions in 2002, Cofield contacted FedEx official Virginia Connors (at "corporate headquarters") on the Lockhart situation, seeking, in his words, to "get a definition of what reasonable accommodations [were]." *Id.* at 330. Although Cofield was familiar with the People Manual and referred to it to identify other employment policies, he was never, in his multiple conversations with Hanratty and other FedEx officials, directed "to go to a disability policy my entire career as it related to the ADA." *Id.* at 372.

On one occasion in 2002, Lockhart advised Cofield that FedEx was regularly providing an ASL interpreter for a hearing impaired employee at a FedEx ramp facility in Ohio. As a result, Cofield contacted Hank Arrington, FedEx's Senior Personnel Representative for the FedEx-BWI Ramp, about the Ohio ASL arrangements. Arrington lacked knowledge

of the Ohio situation, and requested further details from Cofield on the location of the deaf employee (although FedEx apparently had only one ramp facility in Ohio). Cofield, however, did not follow up with Arrington on the hearing impaired employee in Ohio.

In contrast to Cofield, Hanratty knew that the FedEx facility at Dulles employed deaf individuals. Nevertheless, Hanratty did not contact Tony Russell, his managerial counterpart at Dulles, to ascertain whether ADA accommodations were being provided for such employees. Cofield then spoke with Russell, who told him that he had an ASL interpreter – Derwood O'Quinn – assist him at Dulles. Cofield immediately contacted O'Quinn and got approval to hire him to "come in and do meetings and written reviews." J.A. 327. Notably, even after Cofield began using O'Quinn in 2002 to provide ASL interpretation assistance for Lockhart at monthly meetings, no such ASL accommodation was provided for Lockhart at his quarterly meetings with Hanratty.

Hanratty acknowledged that, as of January 2003, he had known about Lockhart's EEOC charge "for years." J.A. 479. Indeed, the initial contact with FedEx about the EEOC charge was mailed to Hanratty by certified mail at the FedEx-BWI Ramp. Hanratty did not, however, advise Cofield about the charge, or seek to verify that FedEx's procedures for addressing such allegations had been complied with. Cofield, on the other hand, did not know of Lockhart's EEOC charge until December 2002, when Connors sent him an email concerning it. Thereafter, in January 2003, Cofield provided Lockhart with FedEx's official form for requesting ADA accommodations. Cofield admitted at

trial, however, that even in early 2003 he did not know what an EEOC charge was.

2.

Following the presentation of the foregoing and other evidence to the jury, the trial proceeded with the jury instructions of the court, the closing arguments of counsel, the jury deliberations, and the return of the verdict. We briefly summarize those aspects of this case.

At the conclusion of the evidence, FedEx moved, pursuant to Federal Rule of Civil Procedure 50(a), for judgment as a matter of law. The trial court denied the Rule 50(a) motion, however, and proceeded to instruct the jury on the legal principles applicable to the EEOC's two claims against FedEx. Of note, FedEx made no objections to the jury instructions. On the factual issue of whether Lockhart had requested that ADA accommodations be made, the jury was instructed, inter alia, that although a disabled employee possesses a general responsibility to inform his employer that such accommodations are necessary, "the need for a request may be excused altogether when a known disability interferes with an employee's ability to make a request." J.A. 572. In such a circumstance, "the employer must make a reasonable effort to understand what [the] needs are." *Id.* at 573.[5]

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[5] With regard to an employee's obligation to inform his employer about needed ADA accommodations, the court explained to the jury that "this burden is not a great one. The employee does not have to mention the ADA or use the phrase 'reasonable

An important aspect of the punitive damages instruction, which is not contested on appeal, was that

> [a]n award of punitive damages will be appropriate in this case only if you find for the EEOC and then further find from a preponderance of the evidence: First, that a higher management official of FedEx personally acted with malice or reckless indifference to Mr. Lockhart's federally-protected rights; and, second, that FedEx itself had not acted in good faith in an attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace.

Id. at 578. The instructions did not specify which FedEx personnel could be deemed to be higher management officials.

In the context of its punitive damages instruction, the court advised the jury on the good-faith issue that

> an employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where those acts by such employees were contrary to the employer's own good faith efforts to comply with the law by implementing policies and programs designed to prevent such unlawful discrimination in the workplace.

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accommodation.' Adequate notice simply informs the employer of both the disability and the employee's need for the accommodations for that disability." J.A. 572.

J.A. 578. The court further emphasized that a "party that . . . delays the interactive process is not acting in good faith." *Id.* at 573. In addition, the instructions advised that a "party who fails to communicate, by way of initiation or response, may also be acting in bad faith." *Id.*

On March 2, 2006, the jury returned its verdict, by way of a "Special Verdict Form," finding, inter alia, that the EEOC had proven by a preponderance of the evidence that FedEx had violated the ADA by failing to provide reasonable accommodations to Lockhart. The verdict specified that "a higher management official of Federal Express acted with malice or reckless indifference to [Lockhart's] federally protected rights," and that "FedEx did *not* act in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace." Special Verdict Form, 1-2, Mar. 2, 2006.[6] On the other hand, the jury rejected the EEOC's contention that FedEx had terminated Lockhart in retaliation for filing a charge with the EEOC. By its verdict, the jury awarded Lockhart the sum of $8,000 in compensatory damages, plus $100,000 in punitive damages. The aggregate of these two damage awards ($108,000) was below the

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[6] During its deliberations, the jury on one occasion submitted questions to the court, including a query relating to FedEx's asserted good-faith efforts: "[A]re we to judge whether FedEx acted in good faith to comply with the law based on the company's stated policies and procedures, or on the Baltimore ramp's performance complying with those policies and procedures?" J.A. 588. In response, the court simply referred the jury to its earlier instructions.

$300,000 statutory maximum prescribed for such employers as FedEx.[7]

C.

In the post-trial proceedings, FedEx renewed its motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), maintaining that the evidence was insufficient to support the jury's award of punitive damages. FedEx moved in the alternative for a remittitur. The trial court denied the Rule 50 relief by its Opinion and Order of April 25, 2006, concluding simply that "[t]he EEOC . . . produced sufficient evidence – accepted by the jury – contradicting FedEx's contentions." J.A. 654. The court also denied the motion for a remittitur of the punitive damages award, being satisfied that "the award in this case falls within the range that Congress has determined to be reasonable." *Id.* at 655. FedEx has filed a timely appeal, maintaining that the trial court erred in denying its motion for judgment as a matter of law, because the evidence was insufficient to support the punitive damages award. Additionally, FedEx contends that the court erred in rejecting its alternative request for a remittitur, in that the punitive damages award was unconstitutionally

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[7] Under the ADA, the sum of any compensatory and punitive damages awarded by a jury is limited, "in the case of a respondent who has more than 500 employees," to $300,000. 42 U.S.C. § 1981a(b)(3)(D).

excessive.[8] We possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review de novo a district court's denial of a posttrial motion for judgment as a matter of law on a punitive damages award. *See Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 443 (4th Cir. 2000). Upon conducting such review, we are obliged to affirm the district court's ruling unless we conclude – viewing the evidence in the light most favorable to the plaintiff, and giving the plaintiff the benefit of all reasonable inferences – that no reasonable jury could have made the punitive damages award being challenged. *See id.*

We generally review for abuse of discretion a district court's denial of a motion for a remittitur. *See Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 305 (4th Cir. 1998). When, however, a remittitur is being sought on a punitive damages award alleged to be constitutionally excessive, our review must be de novo. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001) ("[C]ourts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.").

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[8] FedEx does not, in its appeal, challenge the propriety of the jury's compensatory damages award.

III.

A.

We first address FedEx's contention that the district court erred in denying its Rule 50 motion for judgment as a matter of law on the punitive damages award. The ADA was enacted in 1990 to expand the civil rights protections of individuals with disabilities. *See* 42 U.S.C. § 12101(b)(3)-(4) (declaring purpose of ADA to "ensure that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities" and "to invoke the sweep of congressional authority, . . . to address the major areas of discrimination faced day-to-day by people with disabilities"). Title I of the ADA prohibits discriminatory acts and omissions that abrogate the employment rights of disabled people, including the failure of an employer to make reasonable accommodations for an applicant or an employee's disability. *See* 42 U.S.C. § 12112(b)(5)(A) (defining "discriminate" as, inter alia, the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]"). The ADA incorporates the enforcement provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which are governed in turn by § 1981a of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. *See* 42 U.S.C. § 12117(a).

Pursuant to § 1981a, a plaintiff seeking punitive damages on an ADA claim must prove that his employer acted with the requisite state of mind – that is, that it "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of [the plaintiff]." 42 U.S.C. § 1981a(b)(1). In 1999, the Supreme Court recognized, in *Kolstad v. American Dental Association*, that the statutory requirement of malice or reckless indifference may be proven in the alternative. As a result, proof of "actual malice" is unnecessary for a finding of punitive damages liability if, at a minimum, the plaintiff is able to prove "recklessness in its subjective form." 527 U.S. 526, 536, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999) (citing *Smith v. Wade*, 461 U.S. 30, 45-48, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)). The *Kolstad* Court explained that, in order to prove such recklessness, a plaintiff must establish that his employer "at least discriminate[d] in the face of a perceived risk that its actions [would] violate federal law." *Id.* The Court also observed that the evidence must be sufficient to impute punitive damages liability to the employer. *Id.* at 539. In this regard, the Court explained that, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with" the applicable federal law. *Id.* at 545 (internal quotation marks omitted).

In this trial, the EEOC relied on a theory of reckless indifference to prove its claim for punitive

damages against FedEx.[9] Applying the *Kolstad* principles, we have heretofore explained that, for a punitive damages award to be justified on the basis of reckless indifference, the evidence must be sufficient for a reasonable jury to make four findings:

> (1) That the employer's decision maker discriminated in the face of a perceived risk that the decision would violate federal law;
>
> (2) That the decision maker was a principal or served the employer in a managerial capacity;
>
> (3) That the decision maker acted within the scope of his employment in making the challenged decision; and
>
> (4) That the employer failed to engage in good-faith efforts to comply with the law.

See Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 443-45 (4th Cir. 2000). In this appeal, FedEx does not contest the punitive damages award on the basis of a lack of proof on either the second or third of the *Lowery* factors. That is, it acknowledges that

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[9] Notably, the trial court instructed the jury that it was entitled to award punitive damages if it found that a FedEx managerial official had acted with either malice or reckless indifference. Although the EEOC has not conceded that there was insufficient evidence of malice, the evidence need not have proven malice. To sustain the punitive damages award, the evidence must only have been sufficient to prove reckless indifference. We therefore focus our analysis on the reckless indifference issue.

Lockhart's supervisors served FedEx in a managerial capacity, and that in dealing with Lockhart's ADA accommodation issues they acted within the scope of their employment with FedEx. Rather, FedEx maintains that the evidence failed to prove the first and fourth of the *Lowery* factors – first, that Lockhart's supervisors failed to reasonably accommodate Lockhart in the face of a perceived risk that such failure violated the ADA; and, second, that FedEx failed to engage in good-faith efforts to comply with the ADA.[10] We address these two evidentiary arguments in turn.

1.

On the first of the contested *Lowery* issues, FedEx maintains that the punitive damages award should have been vacated by the district court because, on the evidence, the jury was not entitled to find that Cofield or Hanratty (or others) acted with reckless indifference in failing to provide reasonable ADA accommodations for Lockhart's deafness. More specifically, FedEx contends that Cofield and Hanratty "knew that accommodations were required," and that they "believed they were making sufficient accommodations" for Lockhart. Appellant's Br. 23. A showing of reckless indifference required proof that a

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[10] Although the jury was not instructed in the precise language of the *Lowery* factors, the instructions, viewed as a whole, sufficiently apprised the jury of the applicable legal principles on the *Lowery* issues being pursued on appeal. In any event, the propriety of the instructions was not objected to and is not challenged on appeal.

FedEx managerial official failed to accommodate Lockhart in the face of a perceived risk that such a failure would violate the ADA. *See Kolstad*, 527 U.S. at 536. Significantly, we have heretofore found evidence sufficient to support a jury finding of a perceived risk in cases where the employer's managerial agent had "at least a rudimentary knowledge" of the import of a federal anti-discrimination statute. *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002) (concluding jury entitled to find that supervisor who saw EEOC poster warning against sexual harassment perceived risk of violating Title VII); *see also Lowery*, 206 F.3d at 443 (determining evidence sufficient to prove that supervisors perceived risk of contravening Title VII by refusing to promote African-American employees, in that employer provided training on such legal obligations); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1246 (10th Cir. 1999) (recognizing that, because Wal-Mart manager was familiar with ADA, jury could conclude that Wal-Mart perceived risk of violating ADA by failing to accommodate employee and then transferring and discharging him).

Here, the instructions (to which FedEx did not object) did not specify who – for example, Hanratty, Cofield, Thompson, or someone else – could be considered as a relevant FedEx managerial official. Therefore, if the jury could have found that any one of them perceived the risk that their failure to accommodate Lockhart would violate the ADA, we are not entitled to vacate the punitive damages award for lack of sufficient evidence to support the first *Lowery* finding.

On this evidence, the jury was entitled to find, by way of example, that Hanratty, as an undisputed managerial official, failed to accommodate Lockhart in the face of a perceived risk of violating the ADA. Such a finding could be made on the basis of the following:

- Hanratty was specifically aware of FedEx's internal ADA compliance policy, and had received training from FedEx on the ADA's compliance requirements;

- Hanratty was responsible for all personnel matters at the FedEx-BWI Ramp, and he directly supervised Thompson and Cofield;

- Hanratty was aware – during Lockhart's entire employment period – of Lockhart's deafness disability. Moreover, when Thompson first advised Hanratty that he had hired a deaf employee, Hanratty responded by asking "why" Thompson had done so;

- Under Hanratty's supervision, Thompson and Cofield continually denied or ignored Lockhart's repeated requests for, inter alia, complete notes at daily meetings, and ASL translation (and close-captioning assistance, where appropriate) at his job interview, orientation training, and monthly meetings. As a consequence, Lockhart rarely received notes summarizing daily meetings. For two years, he was repeatedly denied ASL interpretation and closed-captioning at monthly meetings;

- Hanratty convened quarterly meetings that Lockhart was required to attend, and no ASL interpretation was ever made available to Lockhart at those meetings;

- Hanratty denied Cofield's request for training on FedEx's ADA compliance policy;

- Although Hanratty was familiar with the ADA compliance policy included in FedEx's People Manual, he never consulted the policy or encouraged Cofield to read it;

- Hanratty knew that Russell, his managerial counterpart at Dulles, was supervising deaf employees, but Hanratty never contacted Russell to find out what accommodations were being provided to those employees. Eventually, in 2002, Cofield contacted Russell and obtained O'Quinn's services; and

- Hanratty knew about Lockhart's October 2001 EEOC charge for years, but failed to inform Cofield about it. Cofield only found out about the charge from another FedEx official more than a year after it was filed.

The jury was further entitled to find that Cofield knew of his ADA obligation to provide reasonable accommodations to Lockhart for his deafness disability, and thus perceived the risk that his failure to do so would violate the ADA. For example, although Cofield did not receive any ADA training from FedEx, he had contacted other FedEx officials, including Connors in FedEx's "corporate headquarters," an

unnamed official in FedEx's legal department, and Arrington (Senior Personnel Representative for the FedEx-BWI Ramp) seeking clarification on what might constitute reasonable ADA accommodations for Lockhart.

In sum, the trial evidence was sufficient for the jury to find, by a preponderance thereof, that a managerial official of FedEx perceived the risk that his failure to provide Lockhart with reasonable accommodations would contravene the ADA. Thus, the jury was entitled to find that FedEx had acted, in *Kolstad*'s terms, with "recklessness in the subjective form."

2.

On the second of the contested *Lowery* issues (pertaining to the fourth *Lowery* factor), FedEx contends that punitive damages liability could not properly be imputed to it because it made good-faith efforts to comply with the ADA. Specifically, FedEx contends that adoption of its ADA compliance policy, as set forth in the People Manual (providing that reasonable accommodations should be made for disabled employees), in conjunction with its internal grievance policy for handling employee complaints, established that it had acted in good faith to comply with the ADA. FedEx also maintains that the trial evidence failed to prove otherwise.

Unfortunately for FedEx, the mere existence of an ADA compliance policy will not alone insulate an employer from punitive damages liability. Rather, in order to avoid liability for the discriminatory acts of

one of its management officials, an employer maintaining such a compliance policy must also take affirmative steps to ensure its implementation. As we recognized in our *Lowery* decision, "[w]hile an employer's institution of a written policy against . . . discrimination may go a long way toward dispelling any claim about the employer's reckless or malicious state of mind . . ., such a policy is not automatically a bar to the imposition of punitive damages." 206 F.3d at 446. In *Lowery*, Judge Hamilton carefully explained that a jury is not obliged to find that an employer has engaged in good-faith efforts to comply with the law if "the sincerity of [the employer's] commitment to a company-wide policy against . . . discrimination in the workplace is called into question" by other evidence. *Id.*; *see also EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d at 1248-49 (concluding that "written policy against discrimination . . . alone is not enough," where "[o]ur review of the record leaves us unconvinced that [the employer] made a good faith effort to educate its employees about the ADA's prohibitions"); *cf. Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 548-49 (4th Cir. 2003) (rejecting punitive damages liability where employer "had extensively implemented organization-wide Equal Employment Opportunity Policy," established grievance policy encouraging reporting of claims, informed employees of anti-retaliation stance, developed diversity training program, and voluntarily monitored departmental demographics to ensure diversity); *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 254 (1st Cir. 2000) (holding that court properly declined to submit punitive damages question to jury, where record was "replete" with evidence that employer had "instituted policies prohibiting any type of discrimination, trained its personnel to ensure equal

treatment of employees with disabilities, and took good faith efforts to comply with the ADA").

On the evidence, the jury was entitled to find that FedEx failed to sufficiently take affirmative steps to ensure the implementation of its ADA compliance policy with respect to Lockhart. In this case, FedEx managerial officials shared responsibility for the failed implementation of the policy with the company's managerial agents at the FedEx-BWI Ramp. For example, through Cofield, at least three higher FedEx officials received notice that a deaf package handler had requested or was in need of ADA accommodations at the FedEx-BWI Ramp. As noted, Cofield initiated contact in 2001 with an official in FedEx's legal department to clarify FedEx's ADA obligations with respect to Lockhart. In 2002, he contacted Connors at "corporate headquarters" twice, and he contacted Arrington, the Senior Personnel Representative for the FedEx-BWI Ramp, at least once, concerning the need to provide ADA accommodations for Lockhart. Furthermore, Connors – as well as Hanratty – was placed on notice of ADA compliance problems at the FedEx-BWI Ramp when Lockhart filed his charge of discrimination with the EEOC in October 2001.

In spite of such notice, there is no evidence that any alarm bells sounded in FedEx offices. Neither Hanratty nor any other FedEx officials took steps to ensure that Cofield, as Lockhart's immediate supervisor, was adequately prepared to implement FedEx's ADA compliance policy. No one advised Cofield to consult the ADA policy statement in the People Manual, which emphasizes the mandate of the ADA and its reasonable accommodations requirement.

Although Hanratty had himself received training from FedEx on ADA compliance, he denied Cofield's own request for such training. Nor did FedEx show that the steps Cofield eventually took to provide accommodations to Lockhart resulted from Cofield's reference to the People Manual or consultations with his superiors at FedEx. These omissions were significant given that, prior to Lockhart being hired, Cofield had never supervised a hearing impaired employee.

On appeal, FedEx emphasizes the existence of its internal grievance procedure, which is cross-referenced in the ADA compliance policy section of the People Manual. FedEx does not, however, assert that this grievance procedure was ever made available to Lockhart. In fact, Lockhart was not provided with FedEx's form for requesting ADA accommodations until January 2003, almost three years after he began working at the FedEx-BWI Ramp (and the same month in which he was discharged). Under the evidence, FedEx failed to relay basic information about Lockhart's EEOC charge down the chain of command. Although Hanratty knew "for years" that Lockhart had filed an EEOC charge, he failed to inform Cofield about it. J.A. 479. The jury also heard evidence that Cofield was not notified of Lockhart's EEOC charge until approximately fourteen months after it was filed, and at least six months after the EEOC issued its initial ruling thereon.

On this record, viewed in the light most favorable to the EEOC and Lockhart, there was sufficient evidence for the jury to find that FedEx failed to engage in good-faith efforts to implement its ADA

compliance policy, and that, in the context of this case, FedEx's commitment to implementing its grievance process did not go beyond including the procedure in the People Manual.[11] As a result, we must affirm the district court's denial of FedEx's Rule 50 motion for judgment as a matter of law on the punitive damages award.

B.

Alternatively, FedEx challenges on appeal the district court's denial of its motion for a remittitur on the $100,000 punitive damages award. FedEx maintains that the award was unconstitutionally excessive and should be reduced because (1) there was insufficient evidence to show that Lockhart's supervisors had acted reprehensibly; (2) the award was unconstitutionally out of proportion to the $8,000 compensatory damages award; and (3) the court erred

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[11] As noted earlier, the court's instructions on the good-faith issue emphasized that a "party that . . . delays the interactive process is not acting in good faith," and that a "party who fails to communicate, by way of initiation or response, may also be acting in bad faith." J.A. 573. On the evidence, the jury could readily conclude that the interactive process between Lockhart and FedEx on his ADA accommodations issues was continually obstructed and delayed by the inaction and dilatoriness of Cofield, Hanratty, and others at FedEx. As a result, it was entitled to find that FedEx was not acting in good faith. Furthermore, the continuing failure of Cofield and Hanratty to reasonably communicate with Lockhart on his accommodation requests – by way of both initiation and response – sufficiently support a jury finding, under the instructions, that FedEx was acting in bad faith.

in upholding the award solely on the basis that it was below the statutory damages cap.

A punitive damages award is subject to review for compliance with the procedural and substantive constitutional limitations of the Due Process Clause of the Fifth Amendment, lest a grossly excessive award of such damages effect an arbitrary deprivation of property. *See Morgan v. Woessner*, 997 F.2d 1244, 1255 (9th Cir. 1993) (recognizing that Fourteenth Amendment due process principles apply to punitive damages issues pursued under Fifth Amendment); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). If a punitive damages award is unconstitutionally excessive, it is our obligation to order a remittitur or award a new trial. *See Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 305 (4th Cir. 1998).

In assessing the constitutionality of a punitive damages award, we are obliged to adhere to three "guideposts" identified by the Supreme Court: (1) the degree of reprehensibility of the defendant's conduct; (2) any disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive award; and (3) any difference between the award and civil penalties that are authorized or imposed in comparable cases. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

1.

FedEx first maintains that the punitive damages award lacks sufficient evidentiary support on the reprehensibility issue, that is, that the requisite degree of reprehensibility was not established. Reprehensibility is the first and most important of the three *BMW* guideposts. We are obliged to assess a reprehensibility issue on the basis of five factors: (1) whether the harm done was physical as opposed to economic; (2) whether the conduct involved indifference to the health or safety of others; (3) whether the victim was financially vulnerable; (4) whether the conduct involved repeated actions or was isolated; and (5) whether the harm suffered by the plaintiff resulted from conduct that was known or suspected to be unlawful. *BMW*, 517 U.S. at 576-77.

Viewed in the light most favorable to the EEOC, there was evidence of at least three of these factors (the second, fourth, and fifth), sufficient to show that FedEx's conduct could be deemed reprehensible by a jury. For example, FedEx's continuing failure and refusal to provide ADA accommodations for Lockhart's deafness disability did not result from isolated incidents. Lockhart's deafness was always known by his supervisors at the FedEx-BWI Ramp, and his disability never changed. From the time of his request for ASL assistance at his initial job interview with Thompson in early 2000, Lockhart made repeated and unsuccessful requests to FedEx for ASL translation assistance and other accommodations.

Although Lockhart suffered no physical harm from the actions complained of, his supervisors at FedEx

were plainly indifferent to the fact that their failure to accommodate his disability could jeopardize his safety, and potentially implicate the safety of others. Because Lockhart was denied the ADA accommodations necessary for him to understand and participate in employee meetings and training sessions, he consistently missed updates about important subjects such as workplace safety, handling dangerous goods, interpreting hazardous labels, and potential anthrax exposure. Finally, Lockhart's supervisors were familiar with the mandate of the ADA and perceived the risk that their conduct was unlawful. Under the evidence, the jury was thus entitled to find that FedEx higher management officials, including Cofield and Hanratty, had acted reprehensibly with respect to Lockhart's need for ADA accommodations.

2.

FedEx also contends that the "mere proportion" of compensatory damages to punitive damages warrants a remittitur in this case. Appellant's Br. 35. Notwithstanding FedEx's contention, the 12.5 to 1 ratio between the compensatory and punitive damages awards does not, as a matter of law, render the punitive damages award unconstitutionally excessive. As the Supreme Court explained in *BMW*, a punitive damages award should bear some reasonable relationship to the corresponding award of compensatory damages, but such a relationship is only one factor in an excessiveness analysis. *See* 517 U.S. at 580; *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) ("[T]his Court [has] eschewed an approach that concentrates entirely on the relationship between

actual and punitive damages."). Indeed, the Court has specifically declined to draw some mathematical bright line between constitutionally acceptable and unacceptable ratios. *See BMW*, 517 U.S. at 582-83; *see also Campbell*, 538 U.S. at 425-26 (holding that, although ratios are instructive, they are not binding measures of constitutionality); *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 434-35, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001) (observing that constitutionality of punitive damages award is not to be determined by "simple mathematical formula."); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."). Comparatively speaking, the 12.5 to 1 ratio between the compensatory and punitive damages awards in this case is well below the 500 to 1 disparity deemed unconstitutional by the Court in its *BMW* decision. It is also less than the 19 to 1 ratio that was upheld by the First Circuit in *Romano v. U-Haul Int'l*, 233 F.3d 655 (1st Cir. 2000).

3.

Finally, the fact that the punitive damages award, when aggregated with the compensatory damages award, was substantially below the $300,000 statutory cap on such damages, as provided for by 42 U.S.C. § 1981a, provides additional support for the reasonableness and constitutionality of the punitive damages award. The statutory cap of $300,000 provided FedEx with fair notice of the range of available civil penalties for acts of discrimination that

contravened the ADA. *See Romano*, 233 F.3d at 673 ("[A] punitive damages award that comports with a statutory cap provides strong evidence that a defendant's due process rights have not been violated."); *see also Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1245 (10th Cir. 1999) (rejecting contention that award of maximum damages allowable under § 1981a statutory cap is excessive).

FedEx contends that the district court erred on this point, however, in that it based its refusal to reduce the punitive damages award solely on the fact that the award was below the statutory cap, and thus that it was reasonable per se. *See* J.A. 654-55. Even if the court had so ruled, we would yet affirm its denial of FedEx's request for a remittitur, because the punitive damages award was plainly reasonable in light of at least three relevant factors: reprehensibility, proportionality, and the statutory cap.[12]

As a result, we reject FedEx's contention that the punitive damages award is unconstitutionally excessive. In the circumstances, there is no basis for us to order a remittitur of the punitive damages award, and FedEx's alternative request for such relief must be denied.

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[12] In seeking relief in the district court, FedEx addressed all three of these factors (reprehensibility, proportionality, and statutory cap). Although the district court specified the importance of the award being less than the statutory cap, that specification does not necessarily indicate that it ignored FedEx's other assertions on reprehensibility and proportionality. In any event, we have carefully considered – and rejected – each of these contentions.

IV.

Pursuant to the foregoing, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND NORTHERN DIVISION

CIVIL NO.: WDQ-04-3129

[Filed April 25, 2006]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

FEDERAL EXPRESS CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

The U.S. Employment Opportunity Commission ("EEOC"), on behalf of Ronald Lockhart, sued Federal Express Corporation ("FedEx") for violations of the Americans with Disabilities Act[1] (the "ADA"). The case was tried in March 2006. The jury found that FedEx had engaged in intentional discrimination by failing to provide reasonable accommodations for Lockhart. The

[1] 42 U.S.C. § 12101 *et seq.* (2006).

jury also determined that FedEx higher management officials had acted with malice or reckless indifference to Lockhart's federally protected rights. The jury awarded Lockhart $8,000 in compensatory damages, and $100,000 in punitive damages. By awarding punitive damages, the jury rejected FedEx's good faith efforts defense.

Pending are FedEx's motion for judgment as a matter of law ("JNOV") on punitive damages or, alternatively, for remittitur, and the EEOC's motion for equitable relief. For the reasons discussed below, FedEx's motion for JNOV on punitive damages or for remittitur will be denied, and the EEOC's motion for equitable relief will be granted in part and denied in part.

A. Motion for JNOV, or in the alternative, for Remittitur

The Court may grant a motion for JNOV under Federal Rule of Civil Procedure 50(b)only if there was no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. *See Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998). The Court must draw all reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence. *Pathways Psychosocial Support Ctr., Inc. v. Town of Leonardtown*, 223 F.Supp. 2d 699, 706 (D. Md. 2002). If reasonable minds could differ, the Court must deny the motion. *Id.*

Punitive damages are appropriate if a managerial employee, acting within the scope of his employment,

violates the ADA "with malice or reckless indifference to the federally protected rights of a disabled individual." *See Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 443 (4th Cir. 2000); 42 U.S.C. 1981a(b)(1). Despite its employee's conduct, an employer may avoid punitive damages, if it engaged in good faith efforts to comply with the ADA. *See Kolstad v. American Dental Assoc.*, 527 U.S. 526, 535, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999).

FedEx has moved for JNOV on punitive damages arguing that the evidence does not support that 1) FedEx managerial employees acted with malice or reckless indifference to Lockhart's entitlement to a reasonable accommodation, and 2) FedEx did not engage in good faith efforts to comply with the ADA.

FedEx contends that its managers – Cofield and Hanratty – provided Lockhart with reasonable accommodations such as notes, meeting handouts, and closed-captioned videotapes. FedEx, therefore, argues that there was no basis for the jury to find that they acted in disregard of Lockhart's needs. Even assuming that Cofield and Hanratty recklessly disregarded Lockhart's disability, FedEx argues that the company made good faith efforts to comply with the ADA. Specifically, FedEx contends that it implemented a company wide anti-discrimination policy regarding disabled employees. The EEOC, however, produced sufficient evidence – accepted by the jury – contradicting FedEx's contentions. FedEx, therefore, has failed to prove that there was insufficient evidence for the verdict. The Court will decline FedEx's invitation to weigh the evidence and draw all

inferences in its favor. *See Imgarten v. Bellboy Corp.*, 383 F.Supp. 2d 825, 844 (D.Md. 2005).

Alternatively, FedEx argues that remittitur is appropriate because the jury's punitive damages award was excessive.

Under principles of remittitur, a trial judge may reduce the amount of damages awarded by a jury where the damages are grossly excessive and cannot be justified by the record. *Holman v. Mark Industries, Inc.*, 610 F. Supp. 1195, 1204-05 (D.Md. 1985), *aff'd*, 796 F.2d 473 (4th Cir. 1986). Upon properly finding that FedEx acted with malice or reckless indifference to Lockhart's federally protected rights, the jury awarded $100,000 in punitive damages. The statutory cap for an employer of FedEx's size is $300,000. *See* 42 U.S.C. § 1981a(b)(3)(D). As the award in this case falls within the range that Congress has determined to be reasonable, remittitur is inappropriate. *See EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999) (rejecting argument that one-fourth of statutory maximum was excessive).

Accordingly, the Defendants' motion for JNOV on punitive damages or for remittitur will be denied.

B. Motion for Equitable Relief

The EEOC requests an order enjoining FedEx from further denying reasonable accommodations to its disabled employees, requiring an ADA manager training program and posting of a notice to employees informing them of their ADA rights.

The Court has the authority to order injunctive and equitable relief if it finds that the defendant has intentionally engaged . . . in an unlawful employment practice . . ." 42 U.S.C. 2000e-5(g)(1).[2]

Although the Court will grant some equitable relief, it is inappropriate to enjoin FedEx to obey the law. The ADA remains in effect, and an injunction to obey that law would "add nothing". *E.E.O.C. v. Wal-Mart Stores, Inc.*, 2000 U.S. Dist. LEXIS 13458, No.99-CV-106-DRH, 2000 WL 1162029, at *4 (S.D. Ill. Jun. 29, 2000) (denying EEOC's request for permanent injunction against retaliatory discharge of employees).

The Court will require mandatory ADA training for FedEx managers. FedEx contends that court-ordered ADA training would be unnecessarily duplicative of its previous training efforts. The evidence at trial established that FedEx managers at BWI were unaware of the company's policy on disabled employees. Additionally, the Court will order FedEx to post a notice at its Baltimore Ramp reminding its employees of FedEx's ADA Policies.

Accordingly, the EEOC's motion for equitable relief will be granted in part and denied in part.

CONCLUSION

For the reasons discussed above, FedEx's motion for JNOV on punitive damages or for remittitur will be

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[2] This section is incorporated into Section 107(a) of the ADA. *See* 42 U.S.C. § 12117 (a).

denied, and the EEOC's motion for equitable relief will be granted in part and denied in part.

Date: April 25, 2006

/s/
William D. Quarles, Jr.
United States District Judge

APPENDIX C

STATUTES AND REGULATIONS

***** CURRENT THROUGH P.L. 110-198, APPROVED 3/24/2008 *****

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES EMPLOYMENT

42 U.S.C. § 12111

42 U.S.C. § 12111. Definitions

As used in this title:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (*42 U.S.C. 2000e-4*).

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer.

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include--

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under *section 501(c) of the Internal Revenue Code of 1986*.

(6) Illegal use of drugs.

(A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (*21 U.S.C. 812*). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [*21 USCS § 812*].

(7) Person, etc. The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (*42 U.S.C. 2000e*).

(8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship.

(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries.

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation.

(A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) Examination and inquiry.

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. § 12117. Enforcement

(a) Powers, remedies, and procedures. The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (*42 U.S.C. 2000e-4*, *2000e-5*, *2000e-6*, *2000e-8*, and *2000e-9*) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106 [*42 USCS § 12116*], concerning employment.

(b) Coordination. The agencies with enforcement authority for actions which allege employment discrimination under this title and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this title

and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mech nisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 *(46 Fed. Reg. 7435,* January 23, 1981)) in regulations implementing this title and Rehabilitation Act of 1973 not later than 18 months after the date of enactment of this Act [enacted July 26, 1990].

***** THIS SECTION IS CURRENT THROUGH THE APRIL 10, 2008 ISSUE OF *****
***** THE FEDERAL REGISTER *****

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER XIV -- EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1630 -- REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

29 C.F.R. 1630.2 Definitions.

(a) Commission means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 *(42 U.S.C. 2000e-4).*

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 *(42 U.S.C. 2000e).*

(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) Employer -- (1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include –

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from

taxation under *section 501(c) of the Internal Revenue Code of 1986*.

(f) Employee means an individual employed by an employer.

(g) Disability means, with respect to an individual --

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits -- (1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working --

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an

individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by

a covered entity as having a substantially limiting impairment.

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See § 1630.3 for exceptions to this definition).

(n) Essential functions -- (1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) Reasonable accommodation. (1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) Undue hardship -- (1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment

of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

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In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
DBA FEDEX EXPRESS, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the jury's award of punitive damages, in an amount well below the statutory cap on such damages, where the jury specifically found that petitioner acted with "malice or reckless indifference" to an employee's rights under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, and did not undertake good-faith efforts to comply with the law.

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In the Supreme Court of the United States

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 513 F.3d 360. The opinion of the district court denying petitioner's post-verdict motions (Pet. App. 38a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2008. The petition for a writ of certiorari was filed on April 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the District of Maryland found petitioner liable for violating the Americans with Disabilities Act of 1990 (ADA), 42

U.S.C. 12101 *et seq.*, by failing to provide reasonable accommodations to an employee with a disability. The jury awarded compensatory and punitive damages for the violation, and the district court denied petitioner's motion for judgment as a matter of law or for remittitur of the punitive damages award. Pet. App. 38a-43a. The court of appeals affirmed. *Id.* at 1a-37a.

1. The ADA prohibits employers from discriminating against a qualified individual with a disability, and defines the term "discriminate" to include failure to provide a reasonable accommodation. 42 U.S.C. 12112(a) and (b)(5)(A). The ADA incorporates the remedial provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See 42 U.S.C. 12117(a). In 1991, Congress expanded the remedies for intentional discrimination under both Title VII and the ADA by providing for compensatory and punitive damages. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072 (42 U.S.C. 1981a(a)(1) and (2)).

Section 1981a authorizes punitive damages in only those cases where a complaining party demonstrates that the employer not only discriminated unlawfully, but did so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1). Section 1981a further provides that an employer will not be liable in damages for violation of the ADA's reasonable-accommodation requirement if the employer can demonstrate its "good faith efforts" to identify and provide a suitable accommodation. 42 U.S.C. 1981a(a)(3). In addition, Section 1981a imposes a $300,000 cap on the total amount of compensatory and punitive damages that a plaintiff may recover from an employer of petitioner's size. 42 U.S.C. 1981a(b)(3)(D).

2. Ronald Lockhart has been profoundly deaf since birth. He is unable to speak or to read lips, but he is fluent in American Sign Language (ASL), which is his primary language. Lockhart uses ASL to communicate with his wife, who is also deaf, and his children. Pet. App. 3a. English is Lockhart's second language, and his use of written English is "not very good." *Id.* at 8a (quoting C.A. App. 224).

Lockhart applied to work part-time for petitioner as a package handler at the company's facility at what is now Baltimore-Washington International Thurgood Marshall Airport (the BWI Ramp). Pet. App. 3a. Lockhart requested an ASL interpreter for his job interview, but the Operations Manager for the BWI Ramp, Ronald Thompson, denied this request. Lockhart had to bring a friend to translate during the job interview and, after he was hired, at the multi-day orientation session. *Id.* at 6a.

Thompson informed his immediate supervisor, Pat Hanratty, that he had hired a deaf employee. Upon receiving this information, "Hanratty immediately 'ask[ed Thompson] why' he had done so." Pet. App. 6a.

Lockhart's job duties at the BWI Ramp included sorting, scanning, and stacking packages and letters. Lockhart did not need or request any ADA accommodations for his routine job duties. Pet. App. 6a-7a. Petitioner, however, also required its employees to attend daily briefings before each work shift and various employee meetings and training sessions at less frequent intervals. Petitioner used these mandatory sessions to address "essential topics for its employees, such as workplace safety, job training, and employee benefits." *Ibid.* Without an ASL interpreter or other accommodation, Lockhart was not able to understand the content of

these briefings, training sessions, and other meetings. *Id.* at 7a. Lockhart repeatedly asked his supervisors for accommodations that would allow him to understand these sessions; specifically, he asked for complete written notes from the daily briefings and for ASL translation or closed-captioned videos at the monthly meetings so he could understand and participate in these sessions. *Ibid.*

Soon after Lockhart started work, Victor Cofield replaced Thompson as Lockhart's supervisor and as the point of contact for many of Lockhart's requests for accommodation. Pet. App. 7a. Although Cofield was aware of Lockhart's disability, he routinely ignored Lockhart's requests for accommodation, or provided accommodations that Lockhart found inadequate. *Id.* at 7a-9a. Cofield had received no ADA training from petitioner, even after he specifically asked Hanratty for ADA training. *Id.* at 12a-13a.

For his first two years of employment, Lockhart was never given ASL translation of any live presentations; received meeting notes only occasionally, and then only in incomplete form; and sometimes did not even have the benefit of closed-captioning on videotaped training materials. Pet. App. 7a-8a. Because Lockhart could not understand much of the training he received, petitioner directed "team leader[s]," and eventually Cofield himself, to sit with Lockhart during the written tests that followed these training programs and even to answer the test questions for him if Lockhart answered incorrectly. *Id.* at 9a. Lockhart later testified that he was "very embarrass[ed]" by these test-taking arrangements because his co-workers knew about them and necessarily assumed Lockhart was "just stupid." *Ibid.*

Petitioner's failure to provide accommodations also delayed Lockhart in obtaining the security badge required of airport employees following the September 11, 2001 attacks. For several months, Lockhart worked without the mandatory badge and feared he would be fired or laid off for noncompliance with federal aviation regulations. Pet. App. 10a.

Lockhart filed a formal charge of disability discrimination with the Equal Employment Opportunity Commission (EEOC) on October 17, 2001. Pet. App. 4a. The charge was served on Hanratty, who was petitioner's Senior Operations Manager at the BWI Ramp, responsible for all personnel matters at that location. *Id.* at 12a, 14a. Hanratty was familiar with the ADA and its reasonable-accommodation requirement. He had also received ADA training from petitioner and was familiar with the its internal ADA compliance policy, which states that petitioner "provides reasonable accommodation in the employment of the handicapped upon request where such accommodation does not cause undue hardship" and gives examples of reasonable accommodations. *Id.* at 12a & n.4 (citation omitted). Hanratty did not inform Cofield of the EEOC charge, nor did Hanratty attempt to verify whether his subordinates were addressing Lockhart's ADA accommodation needs properly. *Id.* at 14a. Furthermore, although Hanratty knew that petitioner employed deaf individuals at its nearby facility at Dulles International Airport, he did not share that information with Cofield, nor did he consult with the Dulles manager himself. *Id.* at 12a.

Beginning in 2002, Cofield gradually began to provide Lockhart with some accommodations, including occasional assistance by a certified ASL interpreter. Sometime in the fall of 2002, Cofield also began ordering

training videos with closed-captioning. Petitioner still did not provide Lockhart with ASL assistance for daily briefings, training sessions, or quarterly meetings with Hanratty and petitioner's other senior management. Pet. App. 11a, 14a. During this time, Cofield made a number of inquiries with senior officials about the substance of the company's obligation under the ADA to provide reasonable accommodation; none of these officials referred him to petitioner's written ADA policy. *Id.* at 12a-14a. Only after making these inquiries and gradually increasing the assistance made available to Lockhart did Cofield learn of Lockhart's EEOC charge. *Id.* at 14a.

After hearing that Lockhart had filed an EEOC charge, Cofield began, on a consistent basis, to provide Lockhart with written notes on the daily staff briefings. Cofield also began providing Lockhart with "bulleted outlines" for some of the monthly meetings. These were not comprehensive notes, however, and Cofield made these outlines available to Lockhart for only some, but not all, of the monthly meetings. Pet. App. 11a. In January 2003—nearly three years after Lockhart began working at the BWI Ramp—Cofield finally provided Lockhart with the approved form for requesting disability accommodations. *Ibid.* Petitioner terminated Lockhart's employment later that month. *Ibid.*

3. The EEOC investigated Lockhart's charge of disability discrimination and attempted to resolve it through conciliation. When those efforts were unsuccessful, the EEOC brought this action against petitioner in the United States District Court for the District of Maryland, alleging that petitioner was liable under the ADA for failing to provide Lockhart with a reasonable accommodation so he could participate in the employee

meetings and training sessions that he was required to attend. The case proceeded to trial. Pet. App. 4a-5a.

At trial, the jury was instructed that, to award punitive damages, it had to find, first, "that a higher management official of [petitioner] personally acted with malice or reckless indifference to Mr. Lockhart's federally-protected rights" and, second, that petitioner itself did not "act[] in good faith in an attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace." Pet. App. 16a. Petitioner did not preserve any objection to these instructions. See *id.* at 16a, 23a n.10, 24a.

The district court clarified the good-faith issue by explaining that for an employer to avoid liability for the misdeeds of its managers, the actions of its managerial employees must have been "contrary to the employer's own good faith efforts to comply with the law by *implementing* policies and programs designed to prevent such unlawful discrimination in the workplace." Pet. App. 16a (emphasis added) (citation omitted). The district court further explained that a "party that . . . delays the interactive process is not acting in good faith" and that a "party who fails to communicate, by way of initiation or response, may also be acting in bad faith." *Id.* at 17a (citation omitted).

The jury returned a verdict against petitioner. In a special verdict, the jury found that petitioner had discriminated against Lockhart by failing to offer him reasonable accommodation for his disability; that "a higher management official of [petitioner] acted with malice or reckless indifference to [Lockhart's federally protected rights," and that petitioner "did *not* act in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination."

Pet. App. 17a (citation omitted). The jury awarded $8,000 in compensatory damages and $100,000 in punitive damages. *Ibid.*

4. The district court denied petitioner's post-trial motion for judgment as a matter of law as to the punitive damages or, in the alternative, for a remittitur. Pet. App. 38a-43a. Petitioner contended that there was no evidentiary basis for the jury to find that any of its managers acted in disregard of Lockhart's needs because Cofield and Hanratty eventually provided Lockhart with "reasonable accommodations such as notes, meeting handouts, and closed-captioned videotapes." *Id.* at 40a. Petitioner further contended that, in any event, it had proven beyond dispute that it made good-faith attempts to comply with the ADA because "it implemented a company wide anti-discrimination policy regarding disabled employees." *Ibid.* The district court rejected these contentions as insufficient to justify setting aside the jury award and held that the jury's verdict was supported by sufficient evidence. *Id.* at 40a-41a.

5. The court of appeals affirmed. Pet. App. 1a-37a. As relevant here, the court agreed with the district court's assessment that there was sufficient evidence in the record to support the jury's award of punitive damages.

The court of appeals recognized that, under Section 1981a and this Court's precedent, an award of punitive damages under the ADA (or Title VII) requires a finding that the employer "acted with the requisite state of mind," which is, "at a minimum, * * * 'recklessness in its subjective form.'" Pet. App. 21a (quoting *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 536 (1999)). Proof of recklessness requires "at least" a showing that an employer "discriminate[d] in the face of a perceived risk

that its actions [would] violate federal law." *Ibid.* (quoting *Kolstad*, 527 U.S. at 536). The court also recognized that an employer is *not* vicariously liable for punitive damages if the employer's managerial agents acted "'contrary to the employer's good-faith efforts to comply with' the applicable federal law." *Ibid.* (quoting *Kolstad*, 527 U.S. at 545).

With respect to the first question, the court first noted that the uncontested evidence established that both Hanratty and Cofield qualified as managerial employees whose actions could be attributed to the company, and that petitioner did not contest that conclusion. Pet. App. 22a-23a. The court then concluded that the evidence was sufficient to support a finding that either Hanratty or Cofield "discriminated in the face of a perceived risk that the decision would violate federal law." *Id.* at 22a; see *id.* at 24a-27a.

The court of appeals rejected petitioner's argument that the evidence showed that "Cofield and Hanratty * * * 'believed they were making sufficient accommodations' for Lockhart" and therefore did not act recklessly. Pet. App. 23a (quoting Pet. C.A. Br. 23).[1] The court concluded that the jury could rationally have found that Hanratty knew that Lockhart was deaf; knew that the ADA and petitioner's internal policy required reason-

[1] The court of appeals noted that in prior cases, it had found evidence sufficient to support a jury finding of "perceived risk" "where the employer's managerial agent had 'at least a rudimentary knowledge' of the import of a federal anti-discrimination statute." Pet. App. 24a (quoting *Anderson* v. *G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002)). Here, by contrast, petitioner admitted that Hanratty and Cofield "knew that accommodations were required," and it contended only that the two officials allegedly thought they were providing sufficient accommodations. *Id.* at 23a (quoting Pet. C.A. Br. 23).

able accommodation; and despite this knowledge, took no action to see that his subordinates were taking appropriate steps to accommodate Lockhart's needs, even after Lockhart filed an EEOC charge. To the contrary, under Hanratty's management, Lockhart's supervisors repeatedly denied and ignored Lockhart's requests for accommodation. And Hanratty failed to provide Cofield with ADA training even after Cofield requested it. *Id.* at 25a-26a. The court also determined that the jury could have reached a similar conclusion with respect to Cofield. See *id.* at 26a.

With respect to either one of these supervisory employees, the court of appeals held, the trial evidence was sufficient for the jury to find "that a managerial official of [petitioner] perceived the risk that his failure to provide Lockhart with reasonable accommodations would contravene the ADA." Pet. App. 27a. Therefore, the court concluded that the evidence supported a finding that "[petitioner] had acted, in *Kolstad*'s terms, with 'recklessness in the subjective form.'" *Ibid.*

Turning to the second question, the court of appeals rejected petitioner's argument that the adoption of an ADA compliance policy and an internal grievance policy for handling employee complaints demonstrated as a matter of law that petitioner had "acted in good faith to comply with the ADA." Pet. App. 27a. The court noted that an employer must do more than simply maintain a policy; it "must also take affirmative steps to ensure its implementation." *Id.* at 27a-29a. "On the evidence," the court concluded, "the jury was entitled to find that [petitioner] failed to sufficiently take affirmative steps to ensure the implementation of its ADA compliance policy with respect to Lockhart." *Id.* at 29a. In particular, the court noted, petitioner repeatedly failed to provide

proper training and guidance to Cofield concerning the ADA requirements, despite repeated requests by Cofield and knowledge by the company that Cofield was supervising a deaf employee who needed accommodation. *Id.* at 29a-30a.

Petitioner also argued that its internal grievance procedure was evidence of its good-faith efforts, but the court of appeals held that the jury could reasonably have found that petitioner had never made this procedure available to Lockhart—indeed, that petitioner had taken years even to provide him with the company's form for requesting accommodation. Pet. App. 27a, 30a. "[I]n the context of this case," the court concluded, the evidence supported the view that petitioner's "commitment to implementing its grievance process did not go beyond including the procedure in" its human-resources manual. *Id.* at 31a.

Because the court of appeals found sufficient evidence to sustain the jury's key findings—that petitioner's supervisory employees acted with reckless disregard for Lockhart's rights, and that petitioner's implementation of its nondiscrimination policy did not sufficiently show the good faith necessary to exonerate petitioner from liability—it affirmed the award of punitive damages.

ARGUMENT

The court of appeals properly reviewed the punitive-damages award within the parameters that this Court set out in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999). The court's approach is also consistent with that used in other circuits, and its conclusion is amply supported by the trial record in this case. Further re-

view of petitioner's fact-bound challenge to the jury verdict is therefore unwarranted.

1. Petitioner incorrectly suggests (Pet. 9, 10) that the court of appeals' standard for evaluating supervisors' subjective intent conflicts with this Court's decision in *Kolstad*. In fact, the court of appeals drew its standard directly from this Court's opinion, and its application of that standard is consistent with the governing statute as this Court has interpreted it.

The court of appeals recognized that a supervisor acts "'with reckless indifference to [an employee's] federally protected rights'" when the supervisor acts despite "perceiv[ing a] risk that the decision would violate federal law." Pet. App. 21a, 22a (quoting 42 U.S.C. 1981a(b)(1)). That interpretive gloss is fully consistent with *Kolstad*, in which this Court construed Section 1981a(b)(1) for the first time. The Court explained that it would "gain an understanding of the meaning of * * * 'reckless indifference,' as used in § 1981a, from" *Smith* v. *Wade*, 461 U.S. 30 (1983), an earlier decision that involved punitive damages under 42 U.S.C. 1983. *Kolstad*, 527 U.S. at 535. In *Smith*, the Court had made clear that a punitive-damages award requires either malice or "recklessness in its subjective form." *Id.* at 536. That form of recklessness, the Court specified in *Kolstad*, involves knowledge of "a risk of illegality or injury" and a decision to proceed with "'conscious indifference to [the] consequences.'" *Ibid.* (quoting 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 368, at 529 (8th ed. 1891)). See also *Smith*, 461 U.S. at 38 n.6 (explaining that recklessness may involve "indifference toward or disregard for consequences"). "Applying this standard in the context of § 1981a," the Court concluded that "an employer must at least discriminate

in *the face of a perceived risk that its actions will violate federal law* to be liable in punitive damages." *Kolstad*, 527 U.S. at 536 (emphasis added).

Petitioner suggests that examining mere "awareness" of a risk is insufficient and that punitive damages should be imposed only when an employer acts from a "'bad motive.'" Pet. 8-9 (quoting *Kolstad*, 527 U.S. at 538). But in both *Kolstad* and *Smith* this Court took care to give the statutory term "reckless indifference" independent force, rather than treat it as essentially synonymous with malice as petitioner appears to advocate here. See *Smith*, 461 U.S. at 38 n.6 (explaining that recklessness involves "[c]onsciousness of consequences or of wrongdoing" but not necessarily "injurious intent or motive"); *Kolstad*, 527 U.S. at 536.

As this Court recognized in *Kolstad*, the recklessness standard ensures that employers will not be held liable for punitive damages when they attempt in good faith to conform their conduct to the requirements of the law. For example, employers may believe that they are not required to offer particular accommodations, or that the steps they have already taken are sufficient. See *Kolstad*, 527 U.S. at 536-537 (noting that "intentional discrimination [will] not give rise to punitive damages liability" when "the employer discriminates with the distinct belief that its discrimination is lawful"). But, under *Kolstad*, a jury may find that an employer that is fully aware of the ADA's requirements, but disregards the risk that its inaction will violate those requirements, has acted recklessly and is therefore susceptible to punitive damages. The court of appeals properly applied that principle here. Indeed, there was ample evidence that Hanratty was unconcerned about complying with the ADA. See, *e.g.*, Pet. App. 25a-26a.

Thus, petitioner is incorrect in asserting (Pet. 9) that the decision below "will allow the issue [of punitive damages] to go automatically to the jury in every ADA case involving the interactive process, regardless of the employer's state of mind in attempting to comply with its obligations." Pet. 9; see Pet. 11-13, 19. First, as explained above, in this case the court of appeals properly affirmed punitive-damages liability based on record evidence of petitioner's *reckless* failure to accommodate, not just the mere fact that petitioner ultimately was found not to have accommodated Lockhart.

Second, even where the evidence demonstrates such reckless disregard on the part of an employer's managerial agents, an employer can avoid the imposition of punitive damages by demonstrating that it engaged in good-faith efforts to comply with the law. Pet. App. 22a-23a, 27a-31a; see also *Kolstad*, 527 U.S. at 545-556. The Fourth Circuit expressly applied *Kolstad*'s "good faith" standard here. See Pet. App. 22a (citing *Lowery* v. *Circuit City Stores, Inc.*, 206 F.3d 431, 443-445 (4th Cir.), cert. denied, 531 U.S. 822 (2000)); *id.* at 27a-31a. Petitioner ignores this component of the Fourth Circuit's analysis. See, *e.g.*, Pet. 18 (asserting that "the knowledge of FedEx of its ADA obligations and the jury's finding of liability * * * were the *only* factors that the Fourth Circuit required to warrant punitive damages") (emphasis added).

Petitioner therefore errs in asserting that employers' knowledge of the ADA will alone be enough to subject them to punitive damages liability for any ADA violation. Moreover, the good-faith principle, which ensures that employers have an incentive to "detect and deter" discrimination, *Kolstad*, 527 U.S. at 545-546, answers petitioner's objection (Pet. 9) that the court of appeals'

standard will "discourage[] efforts to comply with the ADA." This same purpose is reflected in Section 1981a's "good faith" provision, which permits an employer to avoid punitive damages in the context of ADA reasonable accommodation claims by "demonstrat[ing] good faith efforts, in consultation with the person with the disability * * * to identify and [provide an effective] reasonable accommodation." 42 U.S.C. 1981a(a)(3). The Fourth Circuit had no occasion to apply the statutory "good faith" defense in this case, however, because petitioner never raised it below (nor would it be supported by the facts, which show that petitioner repeatedly ignored Lockhart rather than "consult[] with" him about a reasonable accommodation).

2. Petitioner's allegations of a circuit conflict rest on its inaccurate characterization of the court of appeals' holding here. In fact, the decision below comports with all of the other appellate decisions applying *Kolstad*'s standard for determining when an employer has acted in "reckless indifference" to an employee's ADA rights. Where the evidence has shown the employer's awareness of the law and subjective consciousness that it might be violating the law, combined with actions (or inaction) that demonstrated the employer's indifference to its legal obligations, courts of appeals have upheld punitive damages. Where, on the other hand, the evidence has demonstrated that the employer reasonably believed that its actions complied with the ADA or had no awareness that its actions might violate the ADA, courts of appeals have found the evidence insufficient to support punitive damages, even where the evidence has supported the finding of an ADA violation. This is the inquiry established by *Kolstad*, and petitioner identifies no conflict concerning its application. The difference in

outcomes among these cases is simply the result of applying the same legal standard to different facts.

a. Petitioner incorrectly asserts (Pet. 18) that the court of appeals in this case joined the Tenth Circuit in applying a "diminished standard." That description inaccurately characterizes the decision below, as shown above, and it also inaccurately describes the law in the Tenth Circuit. In the decision petitioner cites, *EEOC* v. *Heartway Corp.*, 466 F.3d 1156 (10th Cir. 2006), the court of appeals held that the jury could consider punitive damages based on evidence of the employer's reckless disregard for the employee's ADA rights. The jury found that an employee was regarded as disabled as a result of hepatitis C and that a supervisor had fired her because of that perceived disability. *Id.* at 1159-1160, 1169. From the supervisor's testimony, the jury could have concluded that he knew "that it was a violation of the ADA to fire someone because they were disabled due to having hepatitis." *Id.* at 1170 (emphasis omitted). The supervisor therefore acted "in the face of a perceived risk that [his] actions would violate federal law," and fired the employee anyway. *Id.* at 1169 (citation omitted). Thus, the evidence of recklessness did not consist only of the supervisor's knowledge of federal law and the ultimate finding of disability; it also included his disregard of the legal risk from his actions, which (as discussed above) suffices to prove recklessness.[2]

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[2] The employer apparently did not attempt to avail itself of the "good faith" defense, but the Tenth Circuit has recognized in other cases that an employer will be immune from punitive-damages liability if it knows of its ADA obligations and makes a good-faith effort to implement them. See, *e.g.*, *EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248-1249 (1999).

b. Properly understood, the decisions of the Fourth and Tenth Circuits are consistent with those of other courts of appeals. For instance, the case on which petitioner principally relies, *Gile* v. *United Airlines*, 213 F.3d 365 (7th Cir. 2000), applied the identical principles. The *Gile* court concluded that, as a factual matter, the employer had not disregarded the risk of an ADA violation but had actively sought to avoid it—albeit unsuccessfully. The employer relied on its regional medical director to evaluate Gile's claim of psychological disability; the medical director concluded that Gile was not disabled and in any event could not be accommodated through the shift transfer she requested. *Id.* at 369-370, 375-376. Thus, "United did not exhibit the requisite reckless state of mind regarding whether its treatment of Gile violated the ADA." *Id.* at 376.

Similarly, in *Sturgill* v. *United Parcel Service*, 512 F.3d 1024 (2008), the Eighth Circuit concluded that an employer's failure to reasonably accommodate an employee's religious belief did not warrant punitive damages, because the employer had acted on its good-faith belief that accommodation would disrupt its business operations and therefore was not legally required. See *id.* at 1035. The thoughtful process that the employer followed in that case, even though ultimately found inadequate, demonstrated that the employer's decision-makers did not act with reckless indifference to the employee's Title VII rights. *Ibid.*

Unlike those decisions, this case involves ample evidence from which to sustain the jury's verdict that one or more supervisors not only knew of the ADA's obligations but recklessly disregarded them. There was no good-faith dispute about Lockhart's disability or about whether he truly needed accommodation. Nor was there

any good-faith reliance on one of the ADA's defenses, such as undue hardship to business operations, 42 U.S.C. 12112(b)(5)(A). Furthermore, here petitioner was given the opportunity to exonerate itself from punitive-damages liability by showing its own good faith. Petitioner failed to convince the jury and does not challenge that fact-bound finding here.

Petitioner's remaining case, *Weissman* v. *Dawn Joy Fashions, Inc.*, 214 F.3d 224 (2000), likewise presents no conflict. In *Weissman*, the Second Circuit applied the "perceived risk" standard from *Kolstad* to an ADA claim. *Id.* at 235. The court found no evidence to "support a finding that Dawn Joy discriminated 'in the face of a perceived risk that its actions will violate federal law.'" *Id.* at 236 (quoting *Kolstad*, 527 U.S. at 536). Indeed, even the plaintiff admitted that his evidence on this point was "not . . . compelling," and he principally relied on an alternative theory of punitive damages based on the employer's litigation conduct. *Id.* at 235-236. The court decided the case based on the factual record, and did not rely on any legal principle about whether knowledge of ADA obligations suffices; indeed, the court of appeals did not discuss *at all* the extent to which the employer knew of and reasonably assessed its ADA obligations. See *ibid.*

Other courts of appeals have similarly applied *Kolstad*'s punitive damages standard in the context of ADA accommodation claims, with consistent results on similar facts. In *Gagliardo* v. *Connaught Laboratories, Inc.*, 311 F.3d 565 (2002), the Third Circuit upheld a jury's award of punitive damages under a "reckless indifference" standard, citing *Kolstad*'s discussion of "perceived risk." The Third Circuit explained that the employer had known Gagliardo had multiple sclerosis, and that

the company human-resources representative had understood the limitations imposed by the disease, had been aware of Gagliardo's numerous requests for accommodation, and had been familiar with the ADA's requirements. The court held that the employer's refusal to act on any of Gagliardo's multiple requests for accommodation, notwithstanding that knowledge, established the necessary predicate for a punitive-damages award. *Id.* at 573.

More recently, in *EEOC* v. *E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (2007), the Fifth Circuit applied *Kolstad*'s punitive damages standard in affirming a jury's punitive-damages award for violation of the ADA where the evidence showed that the employer "was aware of its responsibilities under the ADA" but "made [the plaintiff's] job more difficult" over time rather than attempting to accommodate her physical difficulties. *Id.* at 733. The Fifth Circuit concluded that the jury could reasonably have found that the employer "perceived [the] risk that its actions [would] violate" the ADA, *id.* at 732 (quoting *Kolstad*, 527 U.S. at 536), based on evidence that the employer knew the employee had a medical condition that made it difficult for her to walk, but placed her computer printer more than 100 feet from her desk, whereas other employees' printers were adjacent to their desks. The employer also refused to allow her to demonstrate her ability to evacuate, and then terminated her for an alleged inability to evacuate. *Id.* at 733.

Nothing in these courts' statements of the relevant legal standard (all of which were drawn directly from *Kolstad*) or the application of that standard to particular facts indicates any division among the circuits on this legal issue. Petitioner in essence presses a fact-bound

dispute over the sufficiency of the evidence presented to the jury in this case. Further review of that claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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